

2536  
No. 11959

---

United States  
Circuit Court of Appeals  
for the Ninth Circuit

---

INDEPENDENCE LEAD MINES COMPANY,  
a Corporation,

Appellant,

vs.

ALMA R. KINGSBURY and  
OLGA MARQUARDT,

Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States for the  
District of Idaho, Northern Division.

**FILED**

---

Typo Press, 398 Pacific, San Francisco

JUL 23 1948

PAUL P. O'BRIEN, JR.



No. 11959

---

United States  
Circuit Court of Appeals  
for the Ninth Circuit

---

INDEPENDENCE LEAD MINES COMPANY,  
a Corporation,

Appellant,

vs.

ALMA R. KINGSBURY and  
OLGA MARQUARDT,

Appellees.


---

Transcript of Record

---

Upon Appeal from the District Court of the United States for the  
District of Idaho, Northern Division.

---



Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov

## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Complaint.....	43
Amendment to Motion to Vacate and Set	
Aside Judgment .....	65
Answer .....	38
Appeal:	
Bond on .....	102
Certificate of Clerk to Transcript of Record on .....	117
Designation of Defendant of Record on....	109
Designation of Appellees re Record on....	113
Notice of .....	101
Statement of Points and Designation of	
Transcript of Record on.....	119
Stipulation re Record on.....	114
Bond on Appeal.....	102
Certificate of Clerk to Transcript of Record	
on Appeal .....	117

	Page
Complaint .....	2
Exhibit A—Articles of Incorporation of Independence Lead Mines Company.....	10
Exhibit B—Amendment of the Articles of Incorporation .....	28
Exhibit C—Form of Certificate issued as evidence of Common Stock, Class A.....	33
Complaint—Cause No. 1687—L. J. Hopkins and W. E. Cullen vs. Independence Lead Mines, et al .....	82
Exhibit A—Accounts shown by reports of the Independence Lead Mines Company on file with the Spokane Stock Exchange, Spokane, Washington .....	96
Designation of Transcript Record on Appeal:	
Appellees (D.C.) .....	113
Defendants (D.C.) .....	109
Stipulation re .....	114
Judgment and Decree.....	48
Motion for Default .....	35
Affidavit of H. J. Hull in Support of.....	36
Motion to Dismiss.....	34
Motion to Dismiss Amended Petition for Order Setting Aside Judgment .....	79
Motion to Dismiss Petition for Order Setting Aside Judgment .....	65

### iii.

	Page
Motion to Vacate and Set Aside Judgment, etc.	50
Names and Addresses of Attorneys of Record	1
Notice of Appeal.....	101
Order Denying Motion to Dismiss.....	34
Order Dismissing Petition to Vacate and Set Aside Judgment .....	80
Order Granting Motion to Dismiss Amended Petition for Order Setting Aside Judgment	79
Order to Show Cause and Temporary Restraining Order (Cause No. 1687).....	100
Statement of Points and Request for Printing of Record on Appeal (C.C.A.).....	119
Stipulation re Filing Judgment and Decree...	45
Stipulation re Hearing on Motion to Dismiss Petition to Vacate Judgment; re Filing of Briefs, etc. ....	77
Stipulation re Record on Appeal.....	114





NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

R. MAX ETTER

WILLIAM E. CULLEN

726 Paulsen Building, Spokane, Washington

WALTER H. HANSON

Wallace, Idaho

Attorneys for Appellant.

H. J. HULL

Wallace, Idaho

J. K. CHEADLE

1301 Old National Bank Building,  
Spokane, Washington

Attorneys for Appellees. [2\*]

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Dis-  
trict of Idaho, Northern Division

No. 1603

ALMA R. KINGSBURY and  
OLGA MARQUARDT,

Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,  
a corporation,

Defendant.

### COMPLAINT

Plaintiffs complain of the defendant, and for  
cause of action allege:

#### I.

The jurisdiction of this Court is founded upon  
diversity of citizenship and the amount involved.

(a) The plaintiffs are citizens and residents of  
the State of Idaho.

(b) The defendant is, and at all times herein-  
after mentioned was, a corporation organized and  
existing under and by virtue of the laws of the  
State of Arizona. The defendant is qualified and  
authorized to transact business in the State of  
Idaho and maintains its principal office in the  
City of Wallace, Shoshone County, Idaho.

(c) The matters in controversy exceed \$3,000.00,  
exclusive of interest and costs.

Jurisdiction is also founded upon the fact that

the defendant corporation owns no property and transacts no business in the State of Arizona. It maintains no office in that State except such as is required to maintain its corporate existence there. All of the defendant's property is situated in the County of Shoshone, State of Idaho, and all of its business is transacted there. All books and records of the corporation, including all corporate records material to this controversy, are kept and maintained at Wallace, Shoshone County, Idaho, and all of the defendant's directors and officers reside in the City of Wallace, Idaho. [3]

## II.

The defendant was incorporated in the State of Arizona in the year 1929. Its original Articles of Incorporation were filed in the office of the Arizona Corporation Commission and its charter was issued on the 16th day of September, 1929. A copy of said original Articles of Incorporation, duly certified to by the Secretary of the Arizona Corporation Commission, was filed in the office of the Secretary of State of the State of Idaho on the 12th day of November, 1929, and a copy thereof, duly certified to by the Secretary of State of the State of Idaho, was filed for record in the office of the County Recorder of Shoshone County, Idaho, as Instrument No. 84804 on the 15th day of November, 1929. At all times since the defendant has maintained its right to transact business in the State of Idaho. A full, true and complete copy of

said original Articles of Incorporation is hereunto annexed, marked for identification Exhibit "A", and by this reference is made a part of this Complaint.

### III.

Originally the authorized capital stock of defendant was \$4,000,000.00, divided into 4,000,000 shares of the par value of \$1.00 per share. Said original authorized capital was divided into 3,000,000 shares designated as "Common Stock" and 1,000,000 shares designated as "Preferred Stock", the latter being non-assessable and having certain preferences with respect to the division of profits and proceeds of liquidation, more fully set forth in said Exhibit "A".

### IV.

Prior to February 10, 1932, no part of said 1,000,000 shares of Preferred Stock had been issued. On that date the stockholders of the defendant, by resolution duly adopted at a meeting of the stockholders called for that purpose, amended the Articles of Incorporation by abolishing and eliminating said authorized Preferred Stock and creating and authorizing in lieu thereof 1,000,000 shares to be known as "Common Stock, Class A", and providing that said Common Stock, Class A, should be non-assessable. Said amendment to the Articles of Incorporation of the defendant corporation was duly filed in the office of the Arizona Corporation Commission on the 23rd day of [4]

February, 1932. A copy thereof, duly certified to by the Secretary of the Arizona Corporation Commission, was filed in the office of the Secretary of State of the State of Idaho on the 15th day of March, 1932, and a copy thereof, duly certified to by the Secretary of State of the State of Idaho, was filed in the office of the County Recorder of Shoshone County, Idaho, as Instrument No. 90997 on the 24th day of March, 1932. A full, true and complete copy of the said Amendment to the Articles of Incorporation, marked for identification Exhibit "B", is hereunto annexed and by this reference is made a part of this Complaint.

## V.

Upon the amendment of said Articles of Incorporation, the defendant, for value received, issued said 1,000,000 shares of Common Stock, Class A, evidenced by its Certificate No. 350, to the Mines Finance Corporation, an Idaho Corporation. Thereafter, and on the 31st day of December, 1941, said Mines Finance Corporation assigned and transferred 666,667 shares of said Common Stock, Class A, to the plaintiff, Alma R. Kingsbury, and assigned and transferred 333,333 shares thereof to one Herman Marquardt, deceased husband of the plaintiff, Olga Marquardt. Thereupon the defendant reissued said 666,667 shares to the plaintiff, Alma R. Kingsbury, evidenced by its Certificate No. 7351. and 333,333 shares to the said Herman Marquardt, evidenced by its Certificate No. 7350. A full, true and correct copy of the form of cer-

tificates issued by defendant corporation as evidence of said Common Stock Class A is hereto attached, for identification marked "Exhibit C" and by this reference is made a part of this Complaint.

## VI.

August 29, 1942, the said Herman Marquardt died testate and his Will and Estate were duly probated in the County of Shoshone, State of Idaho, and on the 15th day of September, 1943, a Decree of Distribution was entered therein, wherein and whereby the said 333,333 shares of Common Stock, Class A, of the defendant were distributed to the plaintiff, Olga Marquardt. November 9, 1944, the plaintiff, Olga Marquardt, presented said Certificate No. 7350 to the defendant [5] for transfer to herself and the defendant thereupon issued and delivered its Certificate No. 8341 to the plaintiff, Olga Marquardt, evidencing said 333,333 shares of Common Stock, Class A.

## VII.

The plaintiff, Alma R. Kingsbury, is now the bona fide owner and holder of said 666,667 shares of Common Stock, Class A, evidenced by Certificate No. 7351, and the plaintiff, Olga Marquardt, is now the bona fide owner and holder of said 333,333 shares of Common Stock, Class A, evidenced by Certificate No. 8341.

## VIII.

Plaintiffs are informed and believe, and upon



such information and belief allege that the entire 3,000,000 shares of authorized Common Stock and 1,000,000 shares of authorized Common Stock, Class A, of the defendant heretofore has been issued and is now outstanding.

## IX.

Heretofore defendant acquired and became the owner of 1,001,000 shares of the capital stock of the Clayton Silver Mines, Inc., an Arizona corporation, qualified to transact business in the State of Idaho, and the owner and operator of the Clayton Mine, situated in Custer County, Idaho. For convenience said Clayton Silver Mines, Inc. will hereinafter be referred to as the "Clayton".

## X.

About September 1st, 1944, the defendant authorized the distribution of all or a substantial portion of said Clayton shares to the shareholders of the defendant corporation on the basis of one share of Clayton to each four shares of the defendant company's stock owned by each of the shareholders. As hereinbefore alleged, defendant corporation has 4,000,000 shares issued and outstanding, including the 1,000,000 shares of Common Stock Class A owned by these plaintiffs. Thus the ratio of Clayton shares owned by defendant to its own issued and outstanding stock is one to four.

The defendant is now engaged in making the distribution of said Clayton stock, but in making said distribution defendant is wrongfully and un-

lawfully refusing to distribute any of said Clayton stock to these plaintiffs by virtue of the 1,000,000 shares of [6] Common Stock Class A owned by them as hereinbefore alleged.

## XI.

Plaintiffs have made repeated demands upon defendant for the delivery to them of the shares of Clayton stock to which they are entitled by virtue of their ownership of said 1,000,000 shares of Common Stock Class A, but the defendant has refused, and still refuses, to distribute or issue any part of said Clayton stock to these plaintiffs by virtue of said Common Stock Class A. The defendant wrongfully contends and asserts that said Common Stock Class A, owned by these plaintiffs, is not entitled to participate in the distribution of said Clayton stock, or in any capital distribution which the defendant company may make.

## XII.

Plaintiffs allege that said Common Stock Class A has, and is entitled to enjoy, all of the rights, privileges and benefits of the Common Stock of the defendant company, and are entitled to participate in the distribution of said Clayton stock on the same and identical basis as the Common Stock of the defendant company, to-wit, on the basis of one share of Clayton for each four shares of said common stock Class A. owned by plaintiffs, or a total of 250,000 shares of said Clayton stock.



XIII.

The reasonable value of said 250,000 shares of Clayton stock at the time defendant refused to deliver same to the plaintiffs as herein alleged was the sum of \$150,000.00. That since the distribution of said Clayton stock was authorized by the defendant, and subsequent to plaintiffs' demand therefor, as hereinbefore alleged, the Clayton has declared and paid a dividend of  $1\frac{1}{2}$  cents per share and the dividend attributable to said 250,000 shares, amounting to \$3,000.00, was paid to and received by the defendant corporation. That by reason of defendant's refusal to deliver said Clayton stock to these plaintiffs they have been damaged in the sum of \$153,000.00.

Wherefore, Plaintiffs pray for the judgment of this Court:

1. That the defendant, Independence Lead Mines Company, be ordered and directed to forthwith distribute and deliver to these plaintiffs, 250,000 shares of the capital stock of said Clayton [7] Silver Mines, Inc., and pay to the plaintiffs the sum of \$3,000.00, being the dividend declared and paid thereon as herein alleged.

2. Or that in the alternative plaintiffs have and take judgment against the defendant, Independence Lead Mines Company, for the sum of \$153,000.00, with interest thereon as provided by law.

3. For such other and further relief as to the Court shall seem equitable.

4. For the Costs and disbursements of this action.

H. J. HULL

Attorney for Plaintiffs.

State of Idaho,  
County of Shoshone—ss.

Alma H. Kingsbury and Olga Marquardt, being first duly sworn, say:

That they are the plaintiffs in the above entitled action; that they have read the foregoing complaint and know the contents thereof and believe the facts therein stated to be true.

ALMA R. KINGSBURY  
OLGA MARQUARDT

Subscribed and sworn to before me this 8th day of June, 1945.

[Seal]      H. J. HULL

Notary Public in and for the State of Idaho, residing at Wallace, Idaho. [8]

“EXHIBIT A”

INDEPENDENCE LEAD MINES COMPANY  
ARTICLES OF INCORPORATION

Be It Known, That we, the undersigned, both of Phoenix, Arizona, do hereby associate ourselves

(“Exhibit A”—Continued)

together and form a corporation under the laws of Arizona and adopt the following Articles of Incorporation:

Article I. The name of the corporation is

INDEPENDENCE LEAD MINES COMPANY

and its principal place of transacting business is Phoenix. Offices may be established, business transacted and meetings of stockholders and directors held at such places within or outside of Arizona as the By-Laws of the Company shall provide.

Article II. The general nature of the business proposed to be transacted is to make contracts; to purchase, lease, option, locate or otherwise acquire, own, exchange, sell, or otherwise dispose, pledge, mortgage, hypothecate and deal in mines, mining claims, mill sites, mineral lands, coal lands, oil lands, timber lands, water and water rights and other property, both real and personal, and to work, explore, operate and develop the same, and to deal in the products and by-products thereof; to purchase, lease, or otherwise acquire, erect, own, operate and sell smelting and other ore reduction works, oil refineries, saw-mills, power plants, railroads and tramways to lead from the company's principal works, and steam, electric and motor railroads to serve as common carriers and otherwise outside the State of Arizona; to do a general manufacturing and mercantile business; to own, handle and control letters, patent and inventions; to own,

## ("Exhibit A"—Continued)

cancel and re-issue shares of its own capital stock and to own and vote shares of other corporations; to issue bonds, notes and other evidences of indebtedness and to secure the payment of the same by mortgage, deed of trust or otherwise; to act as agent, trustee, broker, or in any other fiduciary capacity and to borrow and loan money; and in general to do and perform such acts and things and transact such business, not inconsistent with law, in any part of the world, as the Board of Directors may deem to the advantage of the corporation. To engage in any other manufacturing, mining, construction, production, refining or merchandising business of any kind or character whatsoever, and to that end to acquire and own, hold and dispose of any and all property of any nature. To buy and sell ores, bullion, metals and concentrates and tailings and other materials and to reduce ores and minerals for pay. To purchase, use and own and enjoy any and all franchises useful or beneficial for the prosecution of the business of this corporation. To apply for, register, purchase and lease or otherwise acquire, hold, own, use, operate, introduce, develop or control, sell, assign or otherwise dispose of, take or grant licenses or other rights with respect to, and in any and all ways to exploit or turn to account inventions, improvements, copyrights, patents, trade marks, formulae, trade names and distinctive makes and similar rights of any and all kinds and

## ("Exhibit A"—Continued)

whether granted, registered or established by or under the laws of the United States or of state thereof, or of any other country or place. To purchase or otherwise acquire, obtain and interest in, hold, pledge, mortgage, sell exchange or otherwise dispose of stocks, voting trust certificates, bonds, mortgages, debentures, notes, commercial paper and other securities, choses in action, evidences of indebtedness, certificates of interest or other [9] obligations of any nature however evidenced; to exercise any and all rights, powers and privileges of individual ownership or interest in respect to any such securities or obligations, including the right to vote thereon; to acquire or to become interested in any such securities or obligations by original subscription or otherwise and irrespective of whether or not such securities or obligations are fully paid or subject to further payments. To promote, finance, aid and assist financially or otherwise any corporation or association formed under the laws of the United States or of any state, territory, colony or possession thereof, or of the District of Columbia, or of any foreign country or any firm or individual in the business, financing or welfare of which or of whom the corporation has any interest of any nature, or with which or with whom it has business dealings; and in connection therewith to guarantee or become surety for the performance of or assume any undertaking or obligation or the payment of principal of or interest on obligations and dividends on



## ("Exhibit A"—Continued)

stock or other payments whatsoever and by endorsement or otherwise to guarantee the payments of principal of and interest on bonds, debentures, notes, drafts and other securities, evidences of indebtedness and obligations; and to aid in any manner any corporation or association or any firm or individual, of which the corporation is a creditor, or of which stock, voting trust certificates, bonds, mortgages, debentures, notes, drafts, or other securities, evidences of indebtedness, certificates of interest, or obligations are held or owned by the corporation and generally to do any acts or things designed to protect, preserve, improve, or enhance the value of any such stock, voting trust certificates, bonds, mortgages, debentures, notes, drafts, or other securities, evidences of indebtedness, certificates of interest or obligations.

In furtherance and not in limitation of the general powers conferred by the laws of the State of Arizona, and of the objects and purpose hereinbefore stated, it is expressly provided that the corporation shall also have the following powers, that is to say:

(a) To do any and all things herein not forth to the same extent and as fully as natural persons might or could do, and in any part of the world, and as principal, agent, contractor or otherwise and either alone or in conjunction with any other individuals, firms, associations, corporations or syndicates; and to make and perform contracts of every kind and description.

(“Exhibit A”—Continued)

(b) To borrow or raise money and upon any terms and for any purpose; to issue, sell or dispose of the corporation's bonds, debentures, notes, certificates of indebtedness and or other obligations, secured and unsecured and however evidenced, convertible into stock or not so convertible, upon any terms and in any lawful manner; to mortgage, convey or assign in trust, pledge, grant any charge or impose any lien upon all or any part of the real or personal property, rights, interests, or franchises of the corporation, whether owned by it at the time or thereafter acquired.

(c) To make, execute, endorse and accept promissory notes, bills of exchange and other negotiable instruments for any of the purposes of the corporation; and to redeem any debt or other obligation before the same shall fall due on any terms and at any advance or premium.

(d) To pay for any property, rights or interest acquired by the corporation in money or other property, rights or interests or by assigning, issuing or delivering in exchange therefore its own stock, bonds, debentures, notes, certificates of indebtedness and/or other obligations, secured or unsecured and however, evidenced, convertible into stock or not so [10] convertible upon any terms and in any lawful manner; to purchase or otherwise acquire, hold, sell, convey or assign, pledge, transfer, or otherwise dispose of and to re-issue any shares of its own capital stock (so far as may be permitted by law) and its bonds, debentures,

## ("Exhibit A"—Continued)

notes, certificates of indebtedness and/or other obligations, secured or unsecured and however evidenced, convertible into stock or not so convertible, upon any terms and in any lawful manner.

(e) To do all and everything necessary or proper for the accomplishment of the objects herein enumerated or necessary or incidental to the protection or benefit of the corporation and in general to carry on any lawful business necessary or incidental to the attainment of the objects or purposes of the corporation or which may conveniently be carried on in connection with any of the business of the corporation.

(f) To conduct its business and in connection therewith to maintain one or more offices in the State of Arizona, other states, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries.

Nothing herein shall be deemed to limit or exclude any power, right or privilege given to the corporation by law or construed to give to the corporation any rights, powers or privileges not permitted by the laws of the State of Arizona to corporation organized under the statutes of the State of Arizona for the purposes for which the corporation is organized.

The foregoing clauses shall be construed as objects, purposes and powers, and it is expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict



(“Exhibit A”—Continued)

in any manner the objects, purposes and powers of the corporation.

Article III. If so determined by the Board of Directors, the corporation may from time to time receive money and/or other property upon the condition that it credit the amount or value thereof to reserve or surplus and such money or other property may be an undivided part of a consideration for another part of which stock, bonds, debentures and/or other obligations of the corporation are issued. Against any reserve or surplus so established there may be charged losses at any time incurred by the corporation, also dividends or other distributions upon stock. Such reserve or surplus may be reduced from time to time by the Board of Directors for the purposes above specified, or by transfer from such reserve or surplus to capital account.

Article IV. No holder of any stock of the corporation shall be entitled as of right to purchase or subscribe for any part of any unissued stock of the corporation or for any additional stock or any class to be issued pursuant to any increase of the authorized capital stock of the corporation, regardless of how said stock may have been placed in the treasury of the corporation, or of bonds, certificates of indebtedness, debentures or other securities convertible into stock of the corporation but any such unissued stock or any such additional authorized issue of new stock, or of securities convertible into stock may be issued and disposed of

## ("Exhibit A"—Continued)

by the Board of Directors to such persons, corporations, or associations and upon such terms as the Board of Directors may in its discretion determine, without offering to the stockholders then of record, or any class of stockholders thereof, on the same terms or on any terms; and any shares or convertible securities which the Board of Directors may determine to offer for subscription to holders of stock may as said Board of Directors shall determine [11] be offered to holders of any class or classes of stock at the time existing to the exclusion of holders of any or all other classes at the time existing.

Article V. In case the corporation enters into contracts or transacts business with one or more of its directors, or with any firm of which one or more of its directors are members, or with any corporation or association of which one or more of its directors are stockholders, directors or officers, such contract or transaction shall not be invalidated or in anywise affected by the fact that such director or directors have or may have interests therein which are or might be adverse to the interests of the corporation even though the vote of the director or directors having such adverse interest shall have been necessary to obligate the corporation upon such contract or transaction and even though the fact of such interest was not disclosed to other directors or stockholders acting upon or in reference to such contract or transaction. No director or di-

(“Exhibit A”—Continued)

rectors having such adverse interest shall be liable to the corporation or to any stockholder or creditor thereof or to any other person for any loss incurred or by reason of any such contract or transaction nor shall any such director or directors be accountable for any gains or profits realized thereon.

Article VI. The corporation may sell, lease or exchange all of its property and franchises upon the consent of and for such consideration and upon such terms as may be approved by, the holders of a majority of the total number of shares of all stock issued and outstanding, expressed in writing with or without a meeting or by vote at a meeting called for that purpose in the manner provided by the By-Laws of the corporation for special meetings of stockholders.

Article VII. The Board of Directors shall have the general management and control of the business and property of the corporation and may exercise all the powers of the corporation except such as may be expressly limited by statute, charter or By-Laws to the stockholders. Without limiting the generality of the foregoing powers and subject to and unless prohibited by the statutes of the State of Arizona, the Board of Directors, without consent or other action of the stockholders of the corporation may authorize the corporation to purchase, lease or otherwise acquire, hold, mortgage,

## ("Exhibit A"—Continued)

convey or assign in trust, pledge, sell, convey, lease or otherwise dispose of such property, real and personal, without as well as within the State of Arizona, as the Board of Directors may from time to time determine, and in payment for any property or for money or any other consideration and so far as may be lawful, to issue or cause to be issued stock of the corporation or bonds, debentures, notes or other obligations thereof, secured or unsecured and convertible into stock or not so convertible.

Article VIII. The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times as the Board of Directors may designate, in cash, real or personal property, services, leases, options to purchase, or any other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefor, shall thereupon and thereby become and be fully paid as the paid for in cash at par, and the judgment of the directors as to the value of any property, right or thing acquired in exchange for capital stock shall be conclusive. Of said stock 3,000,000 shares shall be known as and called "Common Stock" and shall have the usual [12] rights pertaining thereto. 1,000,000 shares shall be known as and called "Preferred Stock"

## ("Exhibit A"—Continued)

and the holders of said preferred stock shall be entitled to receive from the surplus or net profits of the corporation a yearly dividend of seven per cent, payable quarterly, semi-annually, or annually, as the directors from time to time may decide or as may be at any time provided in and by the By-Laws of the corporation, before any dividends shall be paid on the common stock, but such dividends on the preferred stock shall not be cumulative and the holders of said preferred stock shall not be entitled to participate in any other additional profits except as hereinafter provided. On dissolution or liquidation of the corporation the holders of preferred stock shall be entitled to receive the full par value of said stock and the dividends due thereon before any payment is made on the common stock and any property remaining shall be distributed regularly among the holders of all of the stock in the manner following: If, after the holders of the preferred stock have been paid and have received the full par value of said stock and all dividends due thereon, then the holders of the common stock shall, if sufficient funds remain for that purpose, be paid the par value of their stock. If, after the payment of the par value of both preferred and common stock, any additional funds and/or other resources remain, it shall be distributed ratably among the holders of both preferred and common stock, according to the number of shares held by each.



## ("Exhibit A"—Continued)

At any time during any year of the corporate existence of this company, if and when and after the dividend then due on the preferred stock shall be paid and sufficient funds remain in the treasury of the corporation, then a dividend may be declared on the common stock, but if during any such year a dividend of seven percent shall be paid on the common stock after a dividend of seven percent has been paid on the preferred stock, then any further or additional dividends for any such year shall be paid equally upon the common and preferred stock, it being the intention of this Article to provide that during any year, after a dividend of seven percent has been paid upon the preferred stock and also a dividend of seven percent upon the common stock, then any dividends thereafter declared and/or paid during said year shall be declared and paid in the same amount upon both common and preferred stock.

The preferred stock shall enjoy voting privileges equal to that of the common stock and it is not and shall not be callable or called without the consent of the record holder and/or holders thereof, and no certificate of stock shall be called unless the registered voter thereof consents thereto.

Article IX. The time of the commencement of the corporation shall be the day these Articles are filed in accordance with law and the termination thereof shall be twenty-five years thereafter, with

(“Exhibit A”—Continued)

privilege of renewal and right of perpetual succession as now provided by Law.

Article X. Sec. 1. The affairs of this corporation shall be conducted by and its government vested in a board of not less than three but not more than fifteen directors.

Sec. 2. Within said limits, the number of directors shall be fixed from time to time by the By-Laws. The directors shall be classified with respect to the time for which they shall severally hold office, by dividing them into three classes, each consisting of one-third of the whole number, or, in case the directors shall consist of an odd number, then as near to one-third of the whole number as may be, fixing one class at less than one-third if required. At the [13] annual meeting of stockholders at which this Article is adopted, three directors shall be elected for the ensuing terms and until their successors are duly elected and qualified. The board shall, when elected, determine by majority vote how the three classes shall be constituted for the next one, two and three year terms respectively. Thereafter, at each annual election the successors to the class whose terms expire shall be elected for a term of three years, so that the term of office of one class shall expire in each year. In the case of any increase in the number of directors, the additional directors shall be elected in the manner provided by the By-Laws, by the directors, or by the stockholders at any annual meet-

## ("Exhibit A"—Continued)

ing or adjournment thereof; and one-third of their number shall be elected for the then unexpired portion of the term of directors of the first class, one-third for the unexpired portion of the term of directors of the second class, and one-third for the unexpired portion of the term of directors of the third class, so that each class of directors shall be increased equally, except and provided, that in case there is not an even number of directors, then one of the directors shall be in a separate class and shall be elected accordingly. In case of a decrease in the number of directors, one shall be dropped from each class, as near as may be, unless there shall be an odd number of directors, in which case one shall be dropped before any number of any other class may be dropped.

Sec. 3. In case of any vacancy in any class of directors, thru death, resignation or otherwise, the Board of Directors may elect a successor to hold office for the unexpired portion of the term of the director whose office shall be vacant, and until the election of a successor.

Sec. 4. The Board of Directors shall be chosen by the stockholders from their own number at annual meetings or adjournments thereof, and the annual meeting of the stockholders of the company shall be held at two o'clock P.M. at its principle office in Phoenix, Arizona, on the second Tuesday of January of each year, or at such other place in the United States as may from time to



(Exhibit "A"—Continued)

time be designated by the Board of Directors; in accordance with and if permitted by the laws of the State of Arizona. The first annual meeting of the stockholders after the adoption of this Article shall be held on Tuesday, the 17th day of September, 1929, at two o'clock P.M., at the principal office of the company, in Phoenix, Arizona.

Sec. 5. Meetings of the Board of Directors may be held at the principal office of the company in Phoenix, Arizona, or elsewhere, at such place or places in the United States of America as the Board of Directors, from time to time, may determine. Without notice or call, the Board of Directors shall hold its first annual meeting for the year at the place of the regular quarterly meeting of the board then designated as above provided, immediately after the annual stockholder's meeting, or immediately after the election of directors at such annual meeting.

Article XI. Sec. 1. The Board of Directors, at its first meeting after the annual stockholders' meeting or any adjournment thereof, shall elect from its own number a president, may elect from its own number one or more vice-presidents, and shall also elect a treasurer and a secretary, who need not be members of the board, and may elect an assistant treasurer and an assistant secretary, who also need not be members of the board, to hold office for one year next ensuing and until their

## ("Exhibit A"—Continued)

successors are elected and qualified. The office of vice-president and treasurer or of secretary and treasurer, or of assistant secretary and assistant treasurer, may be held by the same person. All [14] other officers, agents and factors may be appointed for such terms and upon such conditions as the Board of Directors from time to time by resolution shall prescribe.

Sec. 2. The Board of Directors by resolution adopted by a majority of the whole board, may elect from the directors an executive committee. The committee shall consist of one-third of the Board of Directors, including the president, who, by virtue of his office, shall be a member and the chairman thereof. The committee shall, in the interim between the meetings, exercise all powers of that body in accordance with the general policy of the corporation and the direction of the Board of Directors.

Sec. 3. Subject always to the By-Laws made by the stockholders, the Board of Directors may make By-Laws and from time to time alter, amend or repeal any By-Law or By-Laws; but any By-Laws made by the Board of Directors may be altered, amended or repealed by the stockholders in any annual meeting of the company or at any special meeting of the company, provided notice of such proposed alteration, amendment or repeal at any special meeting be included in the notice of such special meeting.

(“Exhibit A”—Continued)

Article XII. The private property of the stockholders of the corporation shall be forever exempt from corporate debts of any kind whatsoever.

Article XIII. The common stock shall be assessable at all times subject to assessment. The same may be assessed from time to time by the directors in any manner and to any extent, and the procedure governing the levy and collection of such assessments shall be as provided by the By-Laws, subject always to the laws of the State of Arizona.

Article XIV. The corporation is incorporated, among other things, for the purpose of consolidating with the Independence Lead Mines, Limited, an Idaho corporation, and for the purpose of taking over the properties of said corporation, and also purchasing the properties of the American Commander Mining and Milling Company, also an Idaho corporation, and the directors of this company shall have full power and authority to effect said consolidation and make said purchase or purchases without consultation with the stockholders of this corporation, so far as permitted by the laws of the State of Arizona.

Article XV. The highest amount of indebtedness or liability to which the corporation is at any time to subject itself is Two Million Five Hundred Thousand Dollars.

Article XVI. This corporation hereby appoints, authorizes, and empowers the Stoddard Incorporat-

(“Exhibit A”—Continued)

ing Company, of Phoenix, its Resident Agent, for the acceptance of service of all necessary process in any action, suit or proceeding that may be had or brought against this company in any of the Courts of the State of Arizona.

In Witness Whereof, We hereunto affix our signatures this 16th day of September, 1929.

[Seal]

C. MARTIN STODDARD

[Seal]

L. MacCALLEN [15]

“EXHIBIT B”

AMENDMENT OF THE ARTICLES  
OF INCORPORATION OF  
INDEPENDENCE LEAD MINES COMPANY

State of Idaho,

County of Shoshone—ss.

Know All Men By These Presents, That on the 8th day of December, 1931, a meeting of the Board of Directors of Independence Lead Mines Company, a corporation organized and existing under and by virtue of the laws of the State of Arizona, was held at the office of the company in Wallace, Idaho; that at said meeting said Board of Directors, by motion regularly made, seconded and carried, called a special meeting of the stockholders of said corporation to be held in conjunction with the regular annual meeting of said stockholders in Phoenix, Arizona, on the 2nd Tuesday in Janu-

ary, 1932, to-wit, on the 12th day of January, 1932, at the hour of two o'clock P.M., for the purpose of considering and voting upon a proposition to amend Article VIII of the Articles of Incorporation of said company so as to abolish and eliminate all of the "Preferred Stock" provided for and created in and by said Article VIII of said Articles of Incorporation, and to provide for and create, in lieu of such "Preferred Stock," 1,000,000 shares of non-assessable stock to be known as and called "Common Stock—Class A."

That thereafter pursuant to said action by said Board of Directors, and more than thirty days prior to said 12th day of January, 1932, a written notice of the time and place and purpose of such special meeting of the stockholders of said corporation was duly given by the secretary of said company by mailing a copy of such notice to each and every stockholder, that is to say, by depositing in the United States Post Office in Wallace, Idaho, a copy of such notice enclosed in a sealed envelope, with postage prepaid, and addressed to each and every stockholder of said corporation at his or her last known address. That at the time specified in said notice, to-wit, at the hour of two o'clock P.M., on the 12th day of January, 1932, such special meeting of said stockholders of said corporation convened and was held at the office of said corporation in the city of Phoenix, Arizona, pursuant to said call and to said notice, and that said meeting was thereupon adjourned until the



hour of two oclock P.M., on the 10th day of February, 1932, to be held at the same place.

That pursuant to said adjournment said special meeting of the stockholders of said corporation was convened and held at the same hour and place on the 10th day of February, 1932; that at said meeting there were present in person and/or presented by proxies, 1,559,306 shares out of a total of 2,413,025 shares outstanding, the stock represented at said meeting being more than a majority of the total outstanding stock of said corporation.

That at said special meeting of said stockholders a motion was duly made and seconded that the following resolution be adopted: [16]

Be it resolved by the stockholders of the Independence Lead Mines Company, in special meeting assembled, that Article VIII of the Articles of Incorporation of the Independence Lead Mines Company be, and the same hereby is, amended to read as follows:

“The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times, as the Board of Directors may designate, in cash, real or personal property, services, leases, options to purchase, or other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefore, shall thereupon and thereby become and be fully paid as though paid for in cash at par and the

judgment of the directors as to the value of any property, right or thing acquired in exchange for capital stock shall be conclusive.”

“Of said stock, 3,000,000 shares shall be known as and called “Common Stock” and shall have the usual rights pertaining thereto. 1,000,000 shares shall be known as and called “Common Stock—Class A” and shall be non-assessable.

Be it further resolved, that said amendment be signed and acknowledged by the president and attested by the secretary of the corporation and that the same be thereupon filed, recorded and published as required by the laws of the State of Arizona and that the secretary of the company be, and he hereby is, authorized and directed to so file, record and publish said amendment.

And upon being put to a vote the aforesaid motion and resolution were carried and adopted, 1,559,306 shares of stock being voted in favor thereof and there being no shares of stock voted to the contrary.

Wherefore, pursuant to said action by said stockholders’ meeting, be it hereby known:

That Article VIII of the Articles of Incorporation of said Independence Lead Mines Company has been and is amended to read as follows, to-wit:

“Article VIII. The amount of authorized stock of the corporation is \$4,000,000.00 divided into 4,000,000 shares of the par value of \$1.00 per share each, which shall be paid in at such time and/or times as the Board of Directors may designate, in

cash, real or personal property, services, leases, options to purchase, or any other valuable right or thing, for the uses and purposes of the corporation, and all shares of capital stock when issued in exchange therefore shall thereupon and thereby become and be fully paid as though paid<sup>\*</sup> for in cash at par and the judgment of the directors as to the value of any property, right or thing acquired in [17] exchange for capital stock shall be conclusive.”

“Of said stock, 3,000,000 shares shall be known as and called “Common Stock” and shall have the usual rights pertaining thereto. 1,000,000 shares shall be known as and called “Common Stock—Class A” and shall be non-assessable.”

In witness whereof, the Independence Lead Mines Company has caused these presents to be signed and acknowledged by its president and to be attested by its secretary this 11th day of February, 1932.

INDEPENDENCE LEAD  
MINES COMPANY

By W. D. Greenough  
Its President.

(Corporate Seal)

Attest:

HERMAN MARQUARDT  
Its Secretary. [18]



EXHIBIT "C"

Incorporated  
Under the Laws of  
the State of Arizona

Number Shares  
Class "A"

INDEPENDENCE LEAD MINES COMPANY  
MINES AT MULLAN, IDAHO

Capitol Stock \$4,000,000  
Shares \$1.00 Each

This certifies that ..... is the  
owner of .....  
Shares of the Capital Stock of Independence Lead  
Mines Company transferrable only on the books of  
this Corporation in person or by Attorney upon  
surrender of this Certificate properly endorsed.

In witness whereof, the said Corporation has  
caused this Certificate to be signed by its duly  
authorized officers and its Corporate Seal to be  
hereunto affixed this ..... day of  
..... A. D. 19.....

.....  
President

.....  
Secretary

Shares \$1.00 each  
Transfer Office  
Wallace, Idaho

[Endorsed]: Filed June 23, 1945. [19]

[Title of Court and Cause]

### MOTION TO DISMISS

Comes now the defendant and moves to dismiss the above entitled action upon the following grounds, to-wit:

1. That the above entitled court lacks jurisdiction over the subject matter of said action as set out in the plaintiff's complaint herein.

2. That the above entitled court lacks jurisdiction over the persons of all of the parties to said action.

3. That the plaintiffs' complaint fails to state a claim upon which relief can be granted.

Wherefore, plaintiff prays that said action be dismissed and that the plaintiffs take nothing thereby and that defendant have and recover its cost herein expended.

CHAS. E. HORNING

F. C. KEANE

Attorneys for Defendant.

(Service accepted.)

[Endorsed]: Filed July 25, 1945. [20]

---

[Title of Court and Cause]

### ORDER

Defendant's motion to dismiss having come on for hearing and having been presented fully by Counsel for defendant and Plaintiffs. At the conclusion of the oral presentation the matter was taken under advisement by the Court. After due consideration and being fully advised, it is ordered

that the Motion to Dismiss be and the same hereby is denied.

The Defendant may have ten days from date hereof in which to file its answer.

Dated November 30, 1945

CHASE A. CLARK,  
United States District Judge.

[Endorsed]: Filed Nov. 30, 1945. [21]

---

[Title of Court and Cause]

### MOTION FOR DEFAULT

The Plaintiffs move the Court as follows:

1. For an Order entering the default of defendant herein, it having failed to plead or otherwise defend this action as provided by the rules and order of this Court.

2. For an order setting said cause for hearing upon plaintiffs' complaint herein.

This motion is based upon the affidavit of H. J. Hull, served and filed herewith, and upon all of the records and files in this case.

Dated at Wallace, Idaho, this 27th day of April, 1946.

H. J. HULL,  
Attorney for Plaintiffs.

### NOTICE OF MOTION

To Independence Lead Mines Company, a corporation, and

To F. C. Keane and C. E. Horning, Its Attorney:

Please take notice, that the undersigned will bring the above motion on for hearing before the Court at the United States District Court Room in the Federal, or Post Office Building, in the City of Boise, Idaho, on the 3rd day of May, 1946, at the hour of 3:30 o'clock P. M. on said day, or as soon thereafter as counsel can be heard.

H. J. HULL,  
Attorney for Plaintiffs.

(Receipt acknowledged.)

[Endorsed]: Filed April 29, 1946. [22]

---

[Title of Court and Cause]

AFFIDAVIT OF H. J. HULL

(Attached to Motion & Notice)

State of Idaho,  
County of Shoshone—ss.

H. J. Hull, being first duly sworn says:

That he is an attorney at law, duly admitted to practice in the above named Court, and that he is the attorney for plaintiffs in the above entitled case. That affiant maintains his office at Wallace, Idaho.

As more fully appears from the records and files herein, on the 30th day of November, 1945, an order was entered in this cause denying Defendant's motion to dismiss said action and granting the defendant ten days from the 30th day of November, 1945, within which to file its answer herein.

Subsequent to the entry of said order attorneys for the defendant, Mr. C. E. Horning and Mr. F. C. Keane, on several occasions requested of affiant extensions of time within which to serve and file defendant's answer, and on each occasion affiant agreed to a short extension. The last of said requests and extension was made on the 10th day of January, 1946, at which time affiant agreed that defendant might have to and including the 17th. day of January, 1946, within which to serve and file its Answer.

On each of these occasions affiant advised counsel for defendant that he was very reluctant to consent to such extensions for the reason that plaintiffs could not prepare for the trial of said cause until they had received defendant's answer and were advised of the defense, if any, intended to be asserted to the complaint herein. On January 10th. 1946, when the extension last referred to was agreed upon, counsel for defendant assured affiant that they would not request any further [23] extension and would serve and file defendant's answer on or before the 17th of January, 1946, without fail.

Defendant failed to serve or file its answer within the time agreed upon between affiant and defendant's counsel, or at all, and no answer has been served or filed herein.

This affidavit is made in support of plaintiffs'

motion for an order directing the entry of the defendant's default herein.

H. J. HULL

Subscribed and sworn to before me this 27th day of April, 1946.

[Seal]

GEORGE W. TABOR

Notary Public in and for the State of Idaho, residing at Wallace, Idaho. [24]

---

[Title of Court and Cause]

ANSWER

Comes now the above named defendant and for answer to plaintiffs' complaint admits, denies and alleges:

I.

This answering defendant admits the allegations contained in Paragraph I of plaintiffs' complaint but denies that this Honorable Court has jurisdiction over the above entitled action for the reason that the said defendant is a corporation organized under the laws of Arizona and that all of the subject matter of this complaint involves the internal affairs of the corporation.

II.

Defendant admits Paragraph II of said complaint.

III.

Defendant admits the allegations contained in Paragraph III of said complaint.

IV.

Defendant denies each and every allegation con-



tained in Paragraph IV of said complaint.

V.

Answering Paragraph V of said complaint, this answering defendant denies that for value received or for any other consideration whatsoever, all said 1,000,000 shares of common stock, Class A, evidenced by its certificate No. 350 to the Mines Finance Corporation, an Idaho corporation, or anyone else, was lawfully issued.

Defendant further denies that on the 31st day of December, 1941, or at any other time whatsoever or at all, the Mines Finance Corporation assigned or transferred 666,667 or said purported common stock, Class A, to the plaintiff, Alma R. Kingsbury, or anybody else, and assigned or transferred 333,333 shares thereof to one Herman Marquardt, deceased husband of [25] the plaintiff Olga Marquardt, and denies that defendant re-issued said 666,667 shares to the plaintiff, Alma R. Kingsbury or anyone else as evidenced by its certificate No. 7351, and 333,333 shares to the said Herman Marquardt or anyone else evidenced by its certificate No. 7350 but admits that a full, true, and correct copy of the form of said certificates as evidence of said common stock, Class A, is attached to plaintiffs' complaint and marked "Exhibit C." In this connection, this answering defendant alleges that said corporation, Mines Finance Corporation, has never been dissolved and that this answering defendant has never been advised nor has there been any proof submitted to this answer-

ing defendant as to whom the shareholders in Mines Finance Corporation actually were or are, that no action has ever been instituted for the dissolution of said corporation and that at no time has this corporation ever been advised by judicial action that either of the plaintiffs in this action or their predecessors in title had any right, title, or interest in and to said shares of stock in said defendant corporation and that at the time that said certificates were so issued as hereinabove set forth, the said Herman Marquardt was the alter ego of said Independence Lead Mines Company, or of the defendant, and that said certificate mentioned as being set over to the said Alma R. Kingsbury was so executed, it was done without any knowledge on the part of the said defendant corporation or its other officers and that it constituted a fraud on the defendant corporation and that at the time the said Olga Marquardt secured her stock in said defendant corporation, that said action was taken thereon accounts, with reference to said transaction were handled by the said Herman Marquardt, now deceased, who at said time was the alter ego of said corporation, and that the defendant has never been advised and is not now advised as to whom the stockholders [26] of Mines Finance Corporation actually were or whether said corporation was entitled to make said transfer or whether said corporation is indebted to any person whatsoever or at all, and that by said purported action, said Mines Finance Corporation, acting through its alter ego, Herman Marquardt, and the plaintiff,

Alma R. Kingsbury, attempted to dispose of all of the assets of said Mines Finance Corporation and that by permitting said transfer to so stand, this answering defendant would become liable to any stockholders which said Mines Finance Corporation might have other than the said Herman Marquardt, now deceased, or Alma R. Kingsbury.

VI.

Answering Paragraph VI of said complaint, this answering defendant admits that said certificate therein mentioned was presented for transfer but at the time that the same was presented, the officers of the answering defendant were not aware of the true state of facts existing with reference to the same.

VII.

Answering Paragraph VII, defendant denies each and every allegation therein contained.

VIII.

Defendant denies that 1,000,000 shares of the authorized common stock, Class A, has been issued and is now outstanding and alleges that if said 1,000,000 shares of Class A stock is now outstanding, that the same is void and of no effect.

IX.

Answering Paragraph IX, defendant admits the allegations contained therein.

X.

This answering defendant admits the allegations contained in the first paragraph of Paragraph X

but denies each and every allegation contained in the second paragraph of said Paragraph X. [27]

### XI.

This answering defendant denies that the said plaintiff, Alma R. Kingsbury, has ever made a demand upon defendant for the transfer and issuance to her of Clayton Silver Mines stock on the basis of one share of Clayton for Four shares of defendant corporation but admits that the plaintiff, Olga Marquardt, has made such demand upon said corporation.

This answering defendant admits that said defendant has refused to admit that the said stock, Class A, purportedly owned by plaintiffs is entitled to any Clayton stock.

### XII.

Defendant denies the allegations contained in Paragraph XII of said complaint.

### XIII.

Defendant admits the value of 250,000 shares of Clayton Silver Mines stock at the time of the refusal of the defendant to transfer same to the plaintiffs, was the sum of \$150,000.00. Defendant also admits that the Clayton company has declared and paid a dividend of 1½c per share on said 250,000 shares but denies that the plaintiffs or either of them has been damaged by reason of defendants refusal to transfer said stock to said plaintiffs in the sum of \$153,000.00 or any other sum whatsoever or at all.

Wherefore, defendant having fully answered

plaintiffs' complaint, prays that the same be dismissed with prejudice to the commencement or the prosecution of another action and that defendant do have and recover its costs herein incurred.

CHAS. E. HORNING,  
EUGENE F. McCANN,  
F. C. KEANE,  
Attorneys for Defendant.

W. H. LANGROISE

Residence and Post Office Address Boise, Idaho.

(Duly verified.)

[Endorsed]: Filed April 29, 1946 [28]

---

[Title of Court and Cause]

### AMENDMENT TO COMPLAINT

The plaintiffs, by leave of the Court first hand and obtained, do hereby amend their original complaint, filed herein June 23, 1945, in the following particulars:

Paragraph XIII of said complaint is amended to read as follows:

#### XIII.

The reasonable value of said 250,000 shares of Clayton stock at the time defendant refused to deliver same to the plaintiffs, as hereinbefore alleged, was \$150,000.00. Said Clayton stock is registered and listed upon the Standard Stock Exchange of Spokane, Washington, and is regularly and extensively traded and dealt in by the public and its



market value is quoted daily upon said exchange.

That on the 18th day of February, 1946, said Clayton stock was quoted and traded upon said Standard Stock Exchange at \$1.50 per share, making the total value of said 250,000 shares, on that date, \$375,000.00.

That on the 1st. day of May, 1946, said stock was quoted and traded upon said Standard Stock Exchange, at \$1.04, making the total value of said 250,000 shares, on that date, \$260,000.00.

That since the distribution of said Clayton stock was authorized by the defendant, and subsequently to plaintiffs' demand therefore, as hereinbefore alleged, the Clayton Silver Mines, Inc., declared and paid a dividend of one-half cent per share and the dividend attributable to said 250,000 shares, amounting to \$3,000.00, was paid to and wrongfully received and retained by the defendant corporation, and it *hs* failed and refused to account to these plaintiffs therefor.

Plaintiffs hereby amend the prayer to their complaint to read as follows: [29]

Wherefore, Plaintiffs pray for the judge or decree of this Court:

1. That the defendant, Independence Lead Mines Company be ordered and directed to forthwith distribute and deliver to these plaintiffs 250,000 shares of the capital stock of the Clayton Silver Mines, Inc., and account to the plaintiffs, and pay to them, the sum of Three Thousand (\$3,000.00) Dollars, being the dividend declared and paid thereon as herein alleged.



2. In the event defendant is unable to deliver said 250,000 shares of Clayton stock to the plaintiffs in full, that then said judgment or decree order and direct the defendant to make the plaintiffs whole with respect to so many shares of said stock as the defendant is unable to deliver to the plaintiffs by payment to plaintiffs of such sum as the Court shall determine meet and equitable, or by such other means as the Court shall determine.

3. For such other and further relief as to the Court shall seem equitable.

4. For the costs and disbursements of this action.

H. J. HULL,  
Attorney for Plaintiffs.

(Service acknowledged.)

[Endorsed]: Filed May 22, 1946. [30]

---

[Title of Court and Cause]

## STIPULATION

It is hereby stipulated by and between the parties to the above entitled action, acting through their respective attorneys, that upon the filing of this stipulation judgment and decree may be entered in favor of the plaintiffs and against the defendant as follows, each party expressly waiving Findings of Fact and Conclusions of Law:

### I.

That judgment be entered denying plaintiffs' claim or right to recover from the defendant 250,-

000 shares of the capital stock of Clayton Silver Mines and that plaintiffs do have and recover from the defendant 170,000 shares of said capital stock of Clayton Silver Mines and no more.

## II.

It is further stipulated and agreed that judgment be entered that the plaintiff, Alma R. Kingsbury, surrender to defendant 266,667 shares of Common Class A stock in defendant corporation and that plaintiff, Olga Marquardt, surrender 133,333 shares of said Class A Common stock in defendant corporation to defendant, all of said shares so surrendered to become the property of defendant corporation.

## III.

That it be further adjudged and decreed that the plaintiff, Alma R. Kingsbury, is the bona fide owner of 400,000 shares of Common Class A stock of the defendant, Independence Lead Mines Company, and that the plaintiff, Olga Marquardt, is the bona fide owner of 200,000 shares of the Common Class A stock of said corporation.

## IV.

That the Common Class A stock of defendant corporation, including the shares thereof owned by the plaintiffs, has and is entitled to the same identical rights, privileges and benefits as the Common stock of the defendant corporation, [31] share and share alike, the only difference and distinction between the said Common stock and Common Class A stock being that the latter is non-assessable.

V.

That a decree be entered ordering and directing the defendant corporation to pay to the plaintiffs, Alma R. Kingsbury and Olga Marquardt, the sum of \$10,050.00 and that said plaintiffs do have and recover judgment against the said defendant for said amount of \$10,050.00.

VI.

That each of the parties shall pay her and its own costs.

Dated this 22 day of June, 1946.

H. J. HULL,  
Attorney for Plaintiffs.

F. C. KEANE,  
EUGENE F. McCANN,  
CHAS. E. HORNING,  
Attorneys for Defendant.

[Endorsed]: Filed June 29, 1946. [32]

In the United States District Court for the Dis-  
trict of Idaho, Northern Division

No. 1603

ALMA R. KINGSBURY and  
OLGA MARQUARDT,

Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,  
a corporation,

Defendant.

### JUDGMENT AND DECREE

This cause came on to be heard upon the pleadings at Coeur d'Alene, Idaho, the 24th day of June, 1946, before the Court sitting without a jury, the plaintiffs being represented by their attorney, H. J. Hull, and the defendant by its attorneys, F. C. Keane, Eugene F. McCann and Chas. E. Horning.

Thereupon the parties filed herein their stipulation that judgment be entered herein in favor of the plaintiffs and against the defendant, and the Court having examined the pleadings, and the stipulation, and having heard and considered the evidence adduced in support thereof, and being now fully advised in the premises:

It is hereby ordered, adjudged and decreed and this does order, adjudge and decree:

#### I.

That the plaintiffs' claim of right to recover

from the defendant 250,000 shares of the capital stock of Clayton Silver Mines be and it hereby is denied and that plaintiffs do have and recover from defendant 170,000 shares of said Clayton Silver Mines capital stock and no more.

## II.

It is further ordered that the plaintiff, Alma R. Kingsbury, surrender to defendant corporation 266,667 shares of Common Class A stock in defendant corporation and that the plaintiff, Olga Marquardt, surrender 133,333 shares of said Common Class A stock in defendant corporation to the defendant corporation, all of said shares so surrendered to become the property of defendant corporation.

## III.

It is further ordered and this does order that the above named plaintiffs do have and recover judgment against defendant, [33] Independence Lead Mines Company, for the sum of \$10,050.00.

## IV.

That plaintiff, Alma R. Kingsbury, is the bona fide owner of 400,000 shares of the Common Class A stock of the defendant, Independence Lead Mines Company, and that the plaintiff, Olga Marquardt, is the bona fide owner of 200,000 shares of the Common Class A stock of the defendant, Independence Lead Mines Company. That the Common stock "Class A" of the defendant, Independence Lead Mines Company, including the 600,000 shares owned by the plaintiffs, as aforesaid, has, possesses, and is entitled to the same and identical rights, privileges and benefits, share

for share, as the Common stock of the said Independence Lead Mines Company, the only difference or distinction between the Common Stock and the Common Stock Class "A" being that the latter is not subject to assessment.

V.

That each party pay her and its own costs.

Dated and done at Coeur d'Alene, Idaho, this 24th day of June, 1946.

CHASE A. CLARK,  
Judge.

[Endorsed): Filed June 29, 1946. [34]

---

[Title of Court and Cause]

MOTION TO VACATE AND SET ASIDE  
JUDGMENT AND REOPEN SAID CAUSE  
TO ALLOW INDEPENDENCE LEAD  
MINES COMPANY TO FILE A PROPER  
ANSWER AND TO REOPEN SAID CAUSE  
FOR TRIAL.

Now comes the above named defendant, Independence Lead Mines Company, an Arizona Corporation, and petitions this Court to vacate and set aside the judgment heretofore rendered on the 24th day of June, 1946, by stipulation without argument or trial, for the following reasons, to-wit:

I.

That said judgment provides for the distribution to said plaintiff, Alma Kingsbury, of 400,000 shares



of stock of the defendant Company known as "Class 'A' Non-assessable Common Stock" and also provides for the distribution to Olga Marquardt of 200,000 shares of such stock and said defendant Company alleges that no consideration has ever been paid to said Company for said stock and the same is wholly without consideration and void and if said judgment is to stand the said judgment should be amended to provide for the payment unto the defendant Company by said plaintiff, Alma Kingsbury, of \$400,000.00 in lawful money of the United States of America and the payment to said defendant Company by said plaintiff, Olga Marquardt, of the sum of \$200,000.00 in lawful money of the United States of America, so as to make the said stock fully paid; where otherwise the said stock is a fraud upon the stockholders of the said defendant Company and is wholly without consideration and should be returned to the treasury of the said defendant Company.

## II.

That at the time of the incorporation of the said defendant Company under the laws of the State of Arizona a capitalization of said Company was made with 3,000,000 shares of "Common Assessable Stock" of the par value of \$1.00 per share and 1,000,000 shares of stock called "Preferred, Non-Assessable Stock" of the par value of \$1.00 per share and later [35] on or about the 10th day of February, 1932, said Articles of Incorporation were amended so as to provide that the said "Non-

assessable Preferred Stock'' of the par value of \$1.00 per share would surrender its preference and would become and would be known as "Class 'A' Non-Assessable Common Stock'' of the par value of \$1.00 per share; and representations were made at said time to all of the stockholders by its officers, including its President and Secretary, that the said stock would be held in the treasury of the Company as unpaid treasury stock subject only to being transferred or exchanged by the said defendant Company in the purchase of other mining properties from time to time during the existence of the said defendant Company.

That no new properties were ever purchased by the defendant Company in accordance with the expressed intention and representations of the officers and directors and trustees of the said Company to make said stock fully paid and said stock was and is wholly unpaid and should be returned to the treasury of the Company.

That during the year 1923, or thereabouts, Henry B. Kingsbury and Herman Marquardt, being then and there the President and Secretary, respectively, of the Independence Lead Mines, Ltd., an Idaho corporation, predecessor in interest to the mining properties of the defendant Company in the Hunter Unorganized Mining District in Shoshone County, Idaho, formed a corporation under the laws of the State of Idaho under the name of Mines Finance Company, and the said Henry B. Kingsbury became the President thereof and the said Herman Marquardt became the Secretary and

Treasurer thereof, and the said Kingsbury and the said Marquardt became and were the sole stockholders of said Mines Finance Company. [36]

That the objects and purposes of the said Mines Finance Company were to take and receive all funds secured by the levying of assessments on the common stock of the Independence Lead Mines, Ltd., and to disburse the same under the direction and for the use and purposes of the President and Secretary of the said Mines Finance Company, being Henry B. Kingsbury and Herman Marquardt, who were the sole stockholders thereof, without any regard to the purposes for which said assessments were levied and to defraud the stockholders of the Independence Lead Mines, Ltd., of all control of the funds so secured by the levying of assessments and which said funds should have been deposited to the credit of the said Independence Lead Mines, Ltd. in its own treasury; and the said Mines Finance Company had no other source of revenue or income whatsoever; and the said Mines Finance Company continued to carry out such course of action until the formation of the present Company under the laws of the State of Arizona, being the defendant Company herein, and after the organization of said defendant Company the said Henry B. Kingsbury, Manager or President and controlling officer of both the Independence Lead Mines, Ltd. and the defendant Company, and Herman Marquardt, Secretary and Treasurer of said Companies; and likewise President and Secretary and Treasurer, respectively, of the Mines

Finance Company, continued to levy assessments upon the assessable stock of the defendant Company and to place said funds as levied in the Mines Finance Company for disbursement for their own purposes and accounts and in fraud of the assessable stockholders of the defendant Company; and between the time of the formation of the defendant Company and the end of the year 1938, the said Kingsbury and Marquardt levied thirteen (13) assessments upon the assessable stock of the defendant Company in the sum of 1c or 2c per share, amounting to [37] many thousands of dollars of money levied upon and from the stockholders owning and holding the assessable common stock of the defendant Company and no assessments levied were ever levied upon or paid by the so-called "Class 'A' Non-assessable Common Stock" of the defendant Company and said stock is wholly unpaid and without any consideration.

### III.

That at some time during or after the year 1930, the said Kingsbury and the said Marquardt, being then and there the Manager and Secretary of the defendant Company and directors and officers of said Company, and being then and there in complete control of the defendant Company and at the same time being, respectively, the President and Secretary of the Mines Finance Company and the sole stockholders thereof and in complete control thereof, for the purpose of unlawfully and illegally acquiring for themselves the ownership of

the said 1,000,000 shares of "Class 'A' Non-assessable Stock" of the defendant Company, and in violation of all representations heretofore alleged to have been made to the holders of common assessable stock, caused the same to be transferred to the Mines Finance Company of which the said Kingsbury and the said Marquardt were, respectively, President and Secretary and officers and directors thereof, and the sole stockholders thereof, without any consideration of any kind whatsoever being given for the said stock by the Mines Finance Company or the said Kingsbury or the said Marquardt, or any of them, and the said "Class 'A' Non-assessable Common Stock" of the defendant Company remained and is wholly unpaid and constitutes and is a fraudulent issue of stock of said defendant Company; and upon and against the holders of the common assessable stock of said defendant Company.

#### IV.

That the said Henry B. Kingsbury died during the month of June, 1940 leaving as his widow and sole heir at law the plaintiff, Alma Kingsbury, and the said Alma Kingsbury [38] thereupon, through probate, became the owner of the stock in the Mines Finance Company theretofore held by her husband, Henry B. Kingsbury, and became an officer and director and stockholder in said Mines Finance Company.

That on or about the 31st day of December, 1941 the said Alma Kingsbury, being then and there an officer and director of the Mines Finance Com-



pany and the holder of two-thirds of the stock of said Mines Finance Company, and the said Herman Marquardt being then and there an officer and director of the Mines Finance Company and the owner of the remaining stock thereof, being a one-third interest in the stock of the said Company, conspired together and caused to be issued unto themselves, without any consideration whatsoever, the "Class 'A' Non-Assessable Common Stock" of the defendant Company, being 1,000,000 shares of stock of the par value of \$1.00 per share, for which no consideration had ever been paid into the treasury of the defendant Company and issued two-thirds of said "Class 'A' Non-Assessable Common Stock", being 666,666  $\frac{2}{3}$  shares of stock to Alma Kingsbury and 333,333  $\frac{1}{3}$  shares of stock to the said Herman Marquardt; and the same was then and is now a continuing fraud upon the stockholders of the defendant Company and the holders of the common assessable stock thereof.

That on or about the 29th day of August, 1942, the said Herman Marquardt died testate in the County of Shoshone, State of Idaho, leaving as his sole heir his wife, Olga Marquardt, who succeeded to the ownership of said one-third share of the 1,000,000 shares of "Class 'A' Non-Assessable Common Stock" of the defendant Company in fraud of the rights of the holders of the common assessable stock of the defendant Company and without any consideration of any kind being paid therefor.

#### V.

That the said Henry B. Kingsbury and the said



Herman Marquardt, being then and there officers, directors and trustees of the defendant Company in carrying out their intent to defraud [39] the holders of the common assessable stock of the defendant Company and to defraud the said Company, illegally and against the laws of the State of Arizona and the State of Idaho, presented and issued and signed as President and Secretary all certificates of stock in the defendant Company as common stock of the par value of \$1.00 per share of 4,000,000 shares and did not print, or cause to be printed, upon said certificates or any of them, as required by the laws of the State of Arizona and the State of Idaho and the general laws of the states forming the United States of America, the differentiation in the classes of the two stocks so as to show to the stockholders and the purchasers of said stock that 3,000,000 shares of the common stock of the defendant Company were assessable stock and 1,000,000 shares of stock so held by the Mines Finance Company and later transferred to the plaintiffs, Alma Kingsbury and Olga Marquardt, as hereinbefore set forth, were non-assessable stock of the par value of \$1.00 per share for 1,000,000 shares, designated and shown as "Class 'A' Non-Assessable Common Stock" and thereby worked a fraud upon the holders of the 3,000,000 shares of assessable common stock, which fraud is a continuing one; the intent and purpose of said Kingsbury and said Marquardt being thereby through the ownership of said "Class 'A' Non-Assessable Common Stock" to remain in perma-

ment control of said Company without paying assessments while levying unlimited assessments on the common assessable stock and the said stockholders had no knowledge of the difference in the classes and values of said stock and all of the said stock being 1,000,000 shares of "Class 'A' Common Stock" is a fraudulent issue and should be set aside and returned to the treasury of the said Company for cancellation as non-assessable stock.

## VI.

That the defendant Company, the Independence Lead Mines Company, since the death of Herman Marquardt in August, 1942, has been under the control and domination of F. C. Keane, [40] of Wallace, Idaho, who acted as President of the Independence Lead Mines Company without any right or authority, as he was not a stockholder in said Company and had not been since sometime in the year 1940 and the said F. C. Keane, without any right or authority, appointed as so-called co-Directors of the defendant Company, Glynn D. Evans and William Mullen of Wallace, Idaho, who served as officers and directors of said Company unlawfully and without any right or authority as neither the said Evans or the said Mullen were ever, at any time, stockholders of the Independence Lead Mines Company and had no right or authority to act as such directors or officers.

That in September, 1944, the said so-called Board of Directors of the Independence Lead Mines Company caused a dividend to be declared from the treasury of the Company of 686,175 shares of stock

of the Clayton Silver Mines Company and caused the same to be paid to the stockholders of said Company then outstanding holding the 2,744,700 shares of issued assessable common stock of defendant Company; and held, undeclared in the treasury of said defendant Company 314,825 shares of Clayton stock. Prior to the stipulation and judgment entered in this action, the said F. C. Keans had sold 218,000 shares of Clayton stock belonging to the treasury of the defendant Company and had converted the sales price of said stock to his own account and to his own personal use and benefit.

That at the time of the stipulation and judgment entered in this action the defendant Company had left in its treasury 96,825 shares of Clayton stock and had under its control 73,175 shares of Clayton previously declared, as above set forth, as a dividend to the common assessable stockholders, but as of that time undistributed.

That said 73,175 shares of Clayton were held in trust by the defendant Company and its then so-called officers for stockholders of the common assessable stock.

That on or about the 23rd day of June, 1945, the said Alma Kingsbury and Olga Marquardt, being then and there the [41] holders of said "Class 'A' Non-assessable Common Stock", as aforesaid, caused this action to be instituted in this Court against the Independence Lead Mines Company, defendant, and the said defendant appeared through its President, F. C. Keane, in said cause

and by answer alleged that the said issuance of said "Class 'A' Common Stock" and the holding thereof by the said plaintiffs, Alma Kingsbury and Olga Marquardt, was fraudulent and a fraud upon the holders of the common assessable stock of the said Company and thereafter, without argument and without trial, the said F. C. Keane, and the so-called Board of Directors of the defendant Company entered into a stipulation with the said plaintiffs by and through their attorney, H. J. Hull, of Wallace, Idaho, to settle the said controversy without argument or trial by allotting to the plaintiff, Alma Kingsbury, 400,000 shares of the "Class 'A' Non-Assessable Common Stock" of the Independence Lead Mines Company and by allotting to the said plaintiff, Olga Marquardt, 200,000 shares of the "Class 'A' Non-Assessable Common Stock" of the Independence Lead Mines Company and by further allowing and awarding to said plaintiffs in said proportion 170,000 shares of stock of the Clayton Silver Mines Company and by further allowing and awarding to said plaintiffs the sum of \$10,050.00 and causing judgment to be entered and rendered against the defendant Company, in accordance with the terms of said stipulation aforesaid; and this Court, on the 24th day of June, 1946, entered such judgment in accordance with said stipulation and the defendant Company, the Independence Lead Mines Company, now asserts that the said judgment is fraudulent and is a fraud upon this Court and this defendant Company, and makes this motion to set aside the same so this

defendant can assert its lawful rights and defend and protect the rights of the holders of the common, assessable stock of this defendant Company; that no disclosure was made to this Court that the award of 170,000 shares of Clayton to the plaintiffs would deprive common assessable stockholders of [42] a dividend previously declared, in the amount of 73,175 shares of Clayton which was a trust for said common stockholders held by the defendant Company and its so-called President, F. C. Keane.

#### VII.

That F. C. Keane, acting as President of the defendant Company, the Independence Lead Mines Company, was in complete control thereof and had sold and disbursed all of the assets of said Company for his own use and benefit, as set forth in the complaint for Receivership, now pending in this Court in the case of L. J. Hopkins et al vs. Independence Lead Mines Company, et al, being Civil Cause No. 1687 to which reference is hereby made. And the said plaintiffs, well knowing that no stockholders' meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by the said Keane was illegal and void.

#### VIII.

That Chase A. Horning, of Wallace, Idaho, acting as one of the attorneys for the defendant, was



paid and received the sum of \$10,000.00 from the said defendant in said settlement; and the said F. C. Keane, acting as one of the attorneys for said defendant, also received the sum of \$10,000.00 from said defendant.

### IX.

That the said plaintiffs have never carried out the terms of settlement incorporated in the judgment of this Court on June 14, 1946 in that they have never returned, or offered to return, to the treasury of the defendant Company, 400,000 shares of "Class 'A' Non-Assessable Common Stock" as provided in said judgment.

### X.

That the said 1,000,000 shares of "Class 'A' Common Non-Assessable Stock" was transferred by them, the officers of [43] the defendant Company, as is more fully set forth in paragraph III herein, and in complete control thereof, acting in collusion with themselves as officers of the Mines Finance Company and in complete control thereof and without any right or authority and the same is wholly void.

That the facts in regard to this transfer and other matters set out herein were never disclosed or discovered until after the new Board of Directors of the Independence Lead Mines Company were elected on the 26th day of May, 1947 and had acquired some of the books and documents and papers of the said Company; that all of the books of said Company have not, as yet, been turned over to the new Board of Directors.



That F. C. Keane, as one of the attorneys of record for the defendant Company, as well as its President and dominating director, by his actions prevented the defendant Company from presenting its defenses to this Court; that said F. C. Keane by filing his answer in this cause and by allegations therein contained caused stockholders to believe said matter would be contested; that the later stipulation and judgment prevented stockholders from intervening in this cause; that the true state of affairs as regards the giving to the plaintiffs of the 73,165 shares of Clayton held in trust for common, assessable stockholders was not, and could not be, discovered until a new Board of Directors took possession of the books and records of the Company, as all facts were concealed by said Keane, for his own purposes and against the rights and in fraud of the interests and rights of the assessable stockholders of said Company and in fraud of this Court.

Wherefore, Independence Lead Mines Company, defendant, prays that the Court enter an order in the above entitled case providing as follows:

- 1 . That the judgment of the Court heretofore entered in the above entitled cause on the 24th day of June, 1946, be [44] vacated and set aside and held for naught.

2. That the parties hereto be restored to the same status as that obtaining upon the filing of the complaint in the above entitled case.

3. That defendant, Independence Lead Mines

Company, be granted twenty days following any order of this Court vacating and setting aside the judgment heretofore rendered, for the purpose of pleading to said complaint by motion or answer as provided in the Federal Rules of Civil Procedure.

4. For such other relief as to the Court may seem just and equitable in the premises.

R. MAX ETTER,

WILLIAM E. CULLEN,

Attorneys for Defendant.

(Duly verified.)

[Endorsed]: Filed June 23, 1947.

### RETURN ON SERVICE OF WRIT

Filed July 3, 1947

United States of America,

District of Idaho—ss:

I hereby certify and return that I served the annexed Motion to vacate and request for new trial on the therein-named Olga Marquardt by handing to and leaving a true and correct copy thereof with her personally at Wallace, Idaho in said District on the 28th day of June, A. D. 1947.

EVERETT M. EVANS

U. S. Marshal.

By J. Bruce Blake, Deputy.

### RETURN ON SERVICE OF WRIT

Filed July 3, 1947

United States of America,

District of Idaho—ss:

I hereby certify and return that I served the

annexed [45] Motion to vacate and request for new trial on the therein-named Alma Kingsbury by handing to and leaving a true and correct copy thereof with her personally at Wallace, Idaho in said District on the 25th day of June, A. D. 1947.

EVERETT M. EVANS

U. S. Marshal,

By J. Bruce Blake, Deputy. [46]

---

[Title of Court and Cause]

MOTION TO DISMISS DEFENDANT'S PETITION FOR ORDER SETTING ASIDE JUDGMENT.

The plaintiffs move the Court as follows:

1. To dismiss the defendant corporation's petition (so-called motion) for an order setting aside the judgment to state a claim against plaintiffs upon which relief can be granted.

H. J. HULL,

Attorney for Plaintiffs.

[Endorsed]: Filed Sept. 12, 1947. [47]

---

[Title of Court and Cause]

AMENDMENT TO MOTION TO VACATE AND SET ASIDE JUDGMENT AND REOPEN SAID CAUSE TO ALLOW INDEPENDENCE LEAD MINES COMPANY TO FILE A PROPER ANSWER AND TO REOPEN SAID CAUSE FOR TRIAL.

The defendant does hereby amend its original

“Motion to Vacate and Set Aside Judgment and Reopen Said Cause for Trial”, filed herein on June Mines Company to File a Proper Answer and to Reopen Said Cause for Trial”, filed herein on June 23, 1947, in the following particulars:

Paragraph VI of said petition is amended to read as follows, to-wit:

VI.

“That the defendant Company, the Independence Lead Mines Company, since the death of Herman Marquardt in August, 1942, has been under the control and domination of F. C. Keane, of Wallace, Idaho, who acted as President of the Independence Lead Mines Company without any right or authority, as he was not a stockholder in said Company and had not been since sometime in the year 1940, and the said F. C. Keane, without any right or authority, appointed as so-called co-directors of the defendant Company, Glynn D. Evans and William Mullen of Wallace, Idaho, who served as officers and directors of said Company unlawfully and without any right or authority as neither the said Evans or the said Mullen were ever, at any time, stockholders of the Independence Lead Mines Company and had no right or authority to act as such directors or officers.

That the said defendant is in possession of a sworn and verified written statement, dated November 29, 1947, made by William Mullen of Wallace, Idaho, that he was never appointed a [48] Director of the Independence Lead Mines Company and never acted as such Director and never

had any knowledge that he had been so appointed a Director or was held out to be a Director until long after the judgment had been entered in this controversy and that he never acted as a Director in any way; the said defendant has also in its possession an affidavit by Glynn D. Evans of Wallace, Idaho, dated November 29, 1947, to the effect that he never knew of any of the sales of the stock of the Clayton Silver Mines Company owned by the Independence Lead Mines Company being made and never authorized or agreed to the same.

That in August, 1944, the so-called Board of Directors of the Independence Lead Mines Company, or at least F. C. Keane and Glynn D. Evans, caused a dividend to be declared from the treasury of the Company of stock of the Clayton Silver Mines Company, and that a portion of the meeting of the Board of Directors of that date is hereinafter quoted:

“Whereas, the stockholders of Independence Lead Mines Company are insistent upon the distribution of a substantial portion of said Clayton Silver Mines stock,

“Now therefore, be it resolved that a distribution of 750,000 shares of the capital stock of Clayton Silver Mines be made to the common stockholders of Independence Lead Mines Company on the basis of one (1) share of Clayton Silver Mines for four (4) shares of Independence Lead Mines Company stock held by all comon stockholders, said distribution to commence on the 20th day of September, 1944 and that the shareholders of this



company be required to send in their Independence Lead Mines Company stock for the purpose of receiving the Clayton dividend and that the Secretary stamp the Independence Lead Mines Company certificates so sent in showing that the Clayton Silver Mines distribution on said stock had been effected.

“Be it further resolved that the Class A common stock of Independence Lead Mines Company do not participate in such distribution for the reason that there is a question as to validity of said Class A common stock.”

That at the time of said meeting and the dividend declared thereat, there were outstanding 2,744,700 shares of issued [49] assessable common stock of defendant company. The Company, after setting enough Clayton aside for this dividend had left undeclared in its treasury 314,825 shares of Clayton stock. Prior to the stipulation and judgment entered in this action, the said F. C. Keane had sold 218,000 shares of Clayton stock belonging to the treasury of the defendant Company and had converted the sales price of said stock to his own account and to his own personal use and benefit.

That at the time of the stipulation and judgment entered in this action the defendant Company had left in its treasury 96,825 shares of Clayton stock and had under its control 73,175 shares of Clayton previously declared, as above set forth, as a dividend to the common assessable stockholders, but as of that time undistributed.

That said 73,175 shares of Clayton were held in



trust by the defendant Company and its then so-called officers for stockholders of the common assessable stock.

That on or about the 23rd day of June, 1945, the said Alma Kingsbury and Olga Marquardt, being then and there the holders of said "Class 'A' Non-assessable Common Stock", as aforesaid, caused this action to be instituted in this Court against the Independence Lead Mines Company, defendant, and the said defendant appeared through its President, F. C. Keane, in said cause and by answer alleged that the said issuance of said "Class 'A' Common Stock" and the holding thereof by the said plaintiffs, Alma Kingsbury and Olga Marquardt, was fraudulent and a fraud upon the holders of the common assessable stock of the said Company, and thereafter, without argument and without trial, the said F. C. Keane and certain of his co-attorneys in this action entered into a stipulation with the said plaintiffs by and through their attorney, H. J. Hull, of Wallace, Idaho, to settle the said controversy without argument or trial by allotting to the plaintiff, Alma Kingsbury, 400,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence [50] Lead Mines Company and by allotting to the said plaintiff, Olga Marquardt, 200,000 shares of the "Class 'A' Non-assessable Common Stock" of the Independence Lead Mines Company and by further allowing and awarding to said plaintiffs in said proportion 170,000 shares of stock of the Clayton Silver Mines Company and by further allowing

and awarding to said plaintiffs the sum of \$10,050.00 and causing judgment to be entered and rendered against the defendant Company, in accordance with the terms of said stipulation afore said; and this Court, on the 24th day of June, 1946, entered such judgment in accordance with said stipulation. The defendant Company, the Independence Lead Mines Company, now asserts that the said judgment is fraudulent and is a fraud upon this Court and this defendant Company, and makes this motion to set aside the same so this defendant can assert its lawful rights and defend and protect the rights of the holders of the common, assessable stock of this defendant Company; that no disclosure was made to this Court that the award of 170,000 shares of Clayton to the plaintiffs would deprive common assessable stockholders of a dividend previously declared, in the amount of 73,175 shares of Clayton which was a trust for said common stockholders held by the defendant Company and its so-called President, F. C. Keane."

Paragraph VII of said motion is amended to read as follows, to-wit:

#### VII.

"That F. C. Keane, acting as President of the defendant Company, the Independence Lead Mines Company, was in complete control thereof and had sold and disbursed all of the assets of said Company for his own use and benefit, as set forth in the complaint for Receivership, now pending in this Court in the case of L. J. Hopkins et al vs.

Independence Lead Mines Company et al, being Civil Cause No. 1687 to which reference is hereby made. And the said plaintiffs, well knowing that no [51] stockholders' meeting of the stockholders of said defendant Company had been held for a period of eight (8) years, and well knowing that there was no legally elected Board of Directors existing and that said so-called Board was illegal, dealt with said F. C. Keane in making said settlement, well knowing at the time that any action taken by the said Keane was illegal and void.

Upon information and belief the said defendant alleges the following, to-wit: That the said plaintiffs, prior to, and during the litigation herein, have claimed to be by many times the largest stockholders of the Independence Lead Mines Company and during said time lived in the Town of Wallace, Idaho, and for a part of said time had maintained therein the principal brokerage office and brokerage business in Wallace, known as Pennaluna & Company, and during all times were in close touch with the said business and knew of the affairs of the said Independence Lead Mines Company and were fully aware that F. C. Keane was not in fact legally the president of the said Company and well knew that said Company had no legal Board of Directors and well knew that the said F. C. Keane was selling large blocks of the Clayton Silver Mining Company stock held by the said Independence Lead Mines Company in its treasury and was applying the proceeds thereof to his own use and was dissipating the same; and the

said plaintiffs claim to be such large stockholders of the Independence Lead Mines Company that they were in virtual control thereof; that the said plaintiffs failed and neglected to interfere in the affairs of the said Company (well knowing that the same was being bankrupted by the so-called president of the said Company) for the reason that they could secure and obtain a better settlement in connection with their own affairs and their ownership of the disputed Class "A" stock and the Clayton dividend that they claimed was due [52] thereon by dealing with the said so-called president who desired to conceal the true condition of the affairs of the said Company and his own misdeeds in connection with its operations; and that by reason of the above said plaintiffs were fully cognizant of all said matters for a long time prior to the settlement made in this case and the judgment entered therein.

Defendant also alleges that on or about July, 1945, or shortly thereafter, and prior to the making of the said settlement and the entry of the stipulated judgment, the said plaintiffs and their said attorney became alarmed at the large sales of stock of the Clayton Silver Mines Company belonging to the said Independence Lead Mines Company and notified, in writing, the said Clayton Silver Mines Company and its officers at its office in Wallace, Idaho, to stop forthwith all further transfers of Clayton stock belonging to the Independence Lead Mines Company and that if any further transfers of said stock were made on the books of the said Clayton Silver Mines Company they would

immediately bring injunction proceedings to prevent further disposition and transfer of said stock as aforesaid.

Upon information and belief, the said defendant alleges the following: That the doings and transactions of the said F. C. Keane in regard to dissipating the cash and funds of the Independence Lead Mines Company and selling the stock of the Clayton Silver Mines Company belonging to the Independence and squandering and dissipating the funds realized therefrom for his own benefit, and the extent of the possession by the Independence Lead Mines Company of the sum of only 170,000 shares of Clayton, including over 73,000 shares held in trust for common assessable stockholders, were well known in all particulars to the said plaintiffs long prior to the settlement made in this controversy and the judgment entered therein. [53]

That sometime prior to said settlement and compromise made in this action, one John Sekulic, being then and there a resident of the Town of Mullan, Idaho, promised and agreed with the said F. C. Keane that he could and would arrange a compromise and settlement of said controversy which the said F. C. Keane proposed to him (and by which proposal the said Keane instructed the said John Sekulic to propose to plaintiffs that Keane would pay over to them all of the stock of the Clayton Silver Mines Company remaining in the treasury of the Independence Lead Mines Company and also stock held as dividend previously declared by defendant and unsold by the said F. C.



Keane and amounting in all to 170,000 shares of said Clayton Silver Mines stock and for the sum of \$10,050.00 cash additional and also 600,000 shares of the Class "A" Common Stock, the legality of said Class "A" stock being then and there in dispute) providing the said F. C. Keane would pay to him, the said John Sekulic, the sum of \$10,000.00 cash as his fee and compensation for his said services immediately the said compromise and settlement was effected; and that further the said John Sekulic would inform the said plaintiffs that if they would not accept the said settlement they would receive nothing by any judgment secured against the Independence Lead Mines Company for the reason that said F. C. Keane would sell and dispose of all the remainder thereof and apply the funds to his own use and that he, the said John Sekulic, would further inform the said plaintiffs that the aforestated amount of stock of the Clayton Silver Mines Company was all of the stock remaining in the treasury, including stock that had been declared as a dividend but had not been paid out at the time to the common assessable stockholders and remained unclaimed as part thereof; that the said F. C. Keane agreed to pay to the said John Sekulic the sum of \$10,000.00 as his fees and compensation for his [54] services in the same; that said John Sekulic immediately after said agreement approached said plaintiffs, or one of them, and arranged and made a compromise and settlement with the said plaintiffs upon the terms agreed and as set out aforesaid, and when he in-



formed the said F. C. Keane that plaintiffs, in view of the circumstances heretofore related, would compromise their said claim, the said F. C. Keane caused a stipulation to that effect to be entered in the pleadings in this cause and a judgment to be entered by this court carrying out the terms of the said settlement; and the said F. C. Keane paid over or caused to be paid over to the said John Sekulic a sum of \$10,000.00 as his fees and compensation for his services therein.

That at the time said compromise and settlement was made by the said John Sekulic the said plaintiffs by reason of the foregoing had full and complete knowledge of all of the said affairs of the Independence Lead Mines Company and well knew that they were securing all of the Clayton stock left in the possession of the Independence Lead Mines Company and including many shares of stock which were being held in trust by the said Company for the use and benefit of certain stockholders other than the plaintiffs under a dividend declared to them by said Company in August and September, 1944.

That for a long period of time the said Independence Lead Mines Company, and more particularly its president, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the

Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington, and the rules and regulations of the Spokane Stock Exchange of Spokane, Washington; and the Secretary of the Securities and Exchange Commission threatened [55] to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as president of the Independence Lead Mines Company and by Glynn D. Evans as Secretary of the said Company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company; that an additional report for the year 1946 was not filed as aforesaid until on or about the 20th day of May, 1947."

R. MAX ETTER

WILLIAM E. CULLEN

WALTER H. HANSON

Attorneys for Defendant.

(Duly verified.)

[Endorsed]: Filed Dec. 11, 1947. [56]

[Title of Court and Cause]

### STIPULATION

Whereas on November 18, 1947 there was a hearing in the above entitled court on the plaintiffs' motion to dismiss the defendant's petition (so-called motion) for order setting aside judgment, with points and authorities and briefs submitted to the court at that hearing; and

Whereas at the conclusion of said hearing the court took the matter under advisement, allowed further briefs to be filed, and requested that further briefs be limited to the question of whether plaintiffs were chargeable by notice or law of fraud within defendant corporation; and

Whereas on December 6, 1947 plaintiffs' supplemental brief limited to the above question was filed, and on the same date defendant corporation served its amendment to its petition (so-called motion) to vacate; and

Whereas the defendant corporation has served and filed a motion for production of documents, and the plaintiffs have served and filed a motion to dismiss the amended petition (so-called motion) to vacate, a motion to strike portions of said amended petition and a motion, supported by affidavits, for more definite statement of portions of said amended petition; and

Whereas it has been informally agreed between the parties, with the informal approval of the court, that the November 18, 1947 hearing be

deemed a hearing on plaintiffs' motion to dismiss defendant corporation's amended petition (so-called motion) to vacate, with modification in the time allowed for filing briefs;

Now, therefore, it is hereby stipulated by the parties hereto as follows: [57]

1. That the November 18, 1947 hearing shall be deemed the hearing on plaintiffs' motion to dismiss the defendant corporation's amended petition (so-called motion) to vacate judgment;

2. Subject to approval of the court, plaintiffs may have until January 2, 1948 to serve and file their brief in support of said motion, the defendant corporation may have until January 23 to serve and file answering brief, and the plaintiffs may have until February 2, 1948 to serve and file their reply brief; and

3. The parties shall not notice for hearing the plaintiffs' motion to strike or the plaintiffs' motion for more definite statement or the defendant corporation's motion for production of documents until after the court has disposed of the plaintiffs' said motion to dismiss.

Dated this 15th day of December, 1947.

H. J. HULL,  
Attorney for Plaintiffs.

R. MAX ETTER,  
Attorney for Defendant  
Corporation.

[Endorsed]: Filed Dec. 17, 1947. [58]

[Title of Court and Cause]

MOTION TO DISMISS DEFENDANT'S  
AMENDED PETITION FOR ORDER  
SETTING ASIDE JUDGMENT

The plaintiffs move the Court as follows:

1. To dismiss the defendant corporation's amended petition (so-called motion) for an order setting aside the judgment entered herein June 23, 1947, because said petition fails to state a claim against plaintiffs upon which relief can be granted.

Dated this 15th day of December, 1947.

H. J. HULL,  
Attorney for Plaintiffs.

(Service acknowledged.)

[Endorsed]: Filed Dec. 17, 1947. [59]

---

[Title of Court and Cause]

ORDER

Plaintiffs in the above entitled cause having heretofore filed Motion to dismiss defendant's amended petition for order setting aside judgment. Motion to strike portions of defendant's Amended Petition for order setting aside judgment, and Motion for more definite statement, directed to defendant corporation's amended petition for order setting aside judgment.

The matter was presented to the Court and briefs later filed.

The Court have fully considered the motions and

other records and files in this cause, orders

That the motion to dismiss defendant's amended petition for order setting aside judgment, be and the same hereby is granted.

Dated this 9th day of February 1948

CHASE A. CLARK,  
United States District Judge.

Note: The above ruling obviously makes it unnecessary to rule on Plaintiffs' other motions.

[Endorsed]: Filed Feb. 9, 1948. [60]

---

[Title of Court and Cause]

## ORDER DISMISSING PETITION TO VACATE AND SET ASIDE JUDGMENT

June 23rd, 1947, the defendant filed herein its petition (or motion) to vacate and set aside the judgment entered herein June 24th, 1946, and to reopen this cause and allow defendant to file another answer and to reopen the cause for trial.

September 12th, 1947, the plaintiffs filed herein their motion to dismiss defendant's petition and the matter came regularly on to be heard at Coeur d'Alene, Idaho, November 18th, 1947, the plaintiffs being represented by their attorney, H. J. Hull, of Wallace, Idaho, and the defendant by its attor-



neys, W. H. Hanson, of Wallace, Idaho, and R. Max Etter and W. E. Cullen, Jr., of Spokane, Washington.

The matter was argued orally by counsel for the respective parties and time allowed for the filing of briefs, and on the 6th day of December, 1947, the defendant filed an amendment to its petition, or motion. December 15th, 1947, plaintiffs filed their motion to dismiss said petition as amended, whereupon counsel stipulated that the hearing of November 18th, 1947, might be deemed the hearing upon defendant's petition, or motion, as amended.

Briefs having been filed by plaintiffs and defendant, and the same having been read and considered by the court, and the court being fully advised in the premises, made and entered an order herein on the 9th day of February, 1948, granting plaintiffs' motion to dismiss the defendant's motion as amended.

The defendant having now advised the court that it desires to stand on its petition, or motion, as amended, and declines to plead further in the case.

Therefore, it is hereby ordered, and the court does hereby order, that the plaintiffs' motion to dismiss the defendant's [61] amended petition, or motion, to set aside the judgment, rendered and entered in this cause on the 24th day of June, 1946, and to reopen said cause, is hereby granted and the defendant's said amended petition, or motion, to set aside said judgment of June 24th, 1946,

and to reopen said case, is hereby dismissed, without leave to further amend.

Dated this 16th day of February, 1948.

CHASE A. CLARK,  
United States District Judge.

(Entered in Civil Docket Book March 30, 1948.)

[Endorsed]: Filed March 30, 1948. [62]

---

In the District Court of the United States, District  
of Idaho

Northern Division  
No. 1687

L. J. HOPKINS and W. E. CULLEN,  
Plaintiffs,

vs.

INDEPENDENCE LEAD MINES COMPANY,  
an Arizona Corporation; F. C. KEANE and  
GLYNN D. EVANS and WILLIAM MULLEN,  
Directors of said corporation,  
Defendants.

### COMPLAINT

Come now the above named plaintiffs and complain of the above named defendants, and for cause of action allege:

#### I.

That said L. J. Hopkins and W. E. Cullen, are citizens of the United States and residents of the State of Washington, residing at Spokane, Wash-

ington; and the Independence Lead Mines Company is a corporation organized and existing under the laws of the State of Arizona, but doing business entirely within the State of Idaho where all its properties and its office for transacting business and its mines are located; and the said F. C. Keane, Glynn D. Evans and William Mullen are citizens and residents of the State of Idaho, living at Wallace, Shoshone County, Idaho; and said plaintiffs bring this action in behalf of themselves and all other stockholders of the Independence Lead Mines Company who care to join in the said action.

## II.

That the Independence Lead Mines Company is a corporation organized under the laws of Arizona, with a capitalization of 3,000,000 shares of \$1.00 per share, assessable stock and 1,000,000 shares of "Class A" non-assessable stock of the par value of \$1.00 per share, doing business wholly in and owning property only in the State of Idaho.

That the mining property of said defendant, Independence Lead Mines Company, incorporated under the laws of Arizona, was originally known as the "Independence Lead Mines, Ltd.", an Idaho corporation, and the said "Independence Lead Mines, Ltd." was an Idaho corporation organized by the plaintiff, W. E. Cullen, in the year 1915 with a capitalization of 1,500,000 shares of the par value of \$1.00 per share.

## III.

That the said plaintiff, W. E. Cullen, caused to

be transferred to the said "Independence Lead Mines, Ltd.", an Idaho corporation, the Independence-Gettysburg group of mining claims, situate, lying and being in the Hunters Creek Unorganized Mining District adjoining the Morning Mine of the Federal Mining and Smelting Company, in Shoshone County, Idaho, and at the time of the transfer he and his predecessors in interest had done a large amount of development work thereon, and after said transfer said plaintiff continued to do work thereon and was the owner of a large block of stock in said Company, and continues to have an interest in said present Company and is now a stockholder of record and has been at various times so a stockholder of record on the books of the Independence Lead Mines Company.

The said plaintiff, L. J. Hopkins, has been for a long time and now is a stockholder of record on the books of the Independence Lead Mines Company and was so a stockholder of record on the books of the Independence Lead Mines Company, an Arizona corporation, at the various times of the acts and deeds and transactions herein complained of, which said acts, deeds and transactions have been and are, continuous in their nature and effect upon the stock and the stockholders of the Independence Lead Mines Company, and affect the rights of all stockholders of said Company.

#### IV.

The said plaintiffs aver that the above named defendant, F. C. Keane, was elected, or appointed, a director several years [64] ago and for a long

time last past has been and is now, President of the Independence Lead Mines Company.

The said plaintiffs further aver that at the time of the election, or appointment, of the said F. C. Keane as a director of said Company the Board of Directors of said Company consisted of five (5) members and that on or about the end of the year 1941, death and resignation of all the other members of said Board left the said F. C. Keane the sole remaining member of the said Board of Directors.

That without any legal right or authority, and against the rights of the stockholders of the Independence Lead Mines Company, the said F. C. Keane then and there failed and refused to call a stockholders' meeting for the purpose of electing a legal Board of Directors of said Company, and without any right or authority, personally appointed William Mullen a member of said Board of Directors and made him Secretary of said Company; and thereafter appointed Glynn D. Evans a member of said Board of Directors, and said Mullen and said Evans are now conducting themselves as members of said Board of Directors without any authority from the stockholders of said Company and, in fact and in truth, said Company has no legal Board of Directors or officers, and has not had for many years past.

## V.

That the Articles of Incorporation of the Independence Lead Mines Company provide that an annual meeting of the Company shall be held at



the office of the Company in Phoenix, Arizona on the 2nd Tuesday of January of each and every year, but despite the same, no meeting of the stockholders has been called or held since the said F. C. Keane became President of the said Company and for a period, to the plaintiffs unknown but which, on information and belief, plaintiffs allege to be for a period of at least eight (8) years last past and said F. C. Keane refuses to call any meeting of stockholders for the election of a new and legal Board of Directors of said Company [65]

#### VI.

That the By-Laws of the said Independence Lead Mines Company provide that no special meeting of stockholders shall be called or held for any purpose unless at least 50% of the stockholders of the Independence Lead Mines Company join in a written petition for such call.

#### VII.

That said plaintiff, W. E. Cullen, has used every effort to secure a special meeting of the stockholders of the Independence Lead Mines Company for the purpose of electing a new Board of Directors to take control of the management and affairs of the said Company, but on account of said provision in the By-Laws and the great amount of stock and stockholders, was and is unable to call said meeting and said plaintiffs herein must resort to this Court to secure their rights herein.

#### VIII.

That in various ways the Independence Lead Mines Company became the owner of 1,001,000



shares of stock in the Clayton Silver Mines Co., an Idaho Corporation, which said stock was set forth in the report of the Independence Lead Mines Company to the Standard Stock Exchange of Spokane, Washington, under date of December 31, 1942, as being of the value of \$872,200.00 and during said year covered by said report cash dividends were paid to the Independence Lead Mines Company on said holdings of the Clayton Silver Mines Co. stock in the amount of \$35,035.00 and after the payment of officers' salaries and expenses for said year a cash balance of \$27,305 was stated in said report to be in bank to the credit of the Independence Lead Mines Company.

IX.

The said defendant, F. C. Keane, during the said time set forth herein, has been receiving as President of said Company the sum of \$200.00 per month and William Mullen, as Secretary of the said Company since September 5, 1942, has been receiving the sum of \$150.00 per month for his services as such Secretary. [66]

X.

That on the 20th day of September, 1944, the Independence Lead Mines Company, through its Board of Directors, declared a dividend to the holders of the common assessable stock of the said Company in the Clayton Silver Mines Co. on the basis of one (1) share of stock in the Clayton Silver Mines Co. for each four (4) shares held and owned by the stockholders of the common assessable stock of the Independence Lead Mines Company, and further declared a cash dividend of the

cash on hand in like proportion to said stockholders.

### XI.

Plaintiffs aver and allege that the stock of the Independence Lead Mines Company was listed on the Standard Stock Exchange of Spokane, Washington, which is now the Spokane Stock Exchange of Spokane, Washington, under the rules of the said Exchange and the rules of the Securities and Exchange Commission of the United States of America, and the same was and is traded in on said Exchange and has been so traded in for several years and since its said listing, and has many stockholders living and residing in many states of the United States of America.

### XII.

Plaintiffs further aver that many stockholders of said Independence Lead Mines Company availed themselves of obtaining the shares of the Clayton Silver Mines Co. stock and the cash as dividends on their holdings of stock in said Company and the stock of the Independence Lead Mines Company thereupon was traded in upon the said Standard Stock Exchange, now the Spokane Stock Exchange, as "Independence Stock" for stock on which dividends had not been taken and as "Independence X" for stock on which said dividends had been taken by the stockholders and said stock was traded in on said Exchange in proportion to the value of Clayton Silver Mines Co. stock where the same had not been taken as a dividend by the stockholders and proportionately less where the

stock had been taken as a dividend, and is now being traded in extensively on said basis. [67]

### XIII.

Plaintiffs aver that immediately upon declaration of the dividends so made as aforesaid, on the 20th day of September, 1944, the said stock of the Clayton Silver Mines Co. and the cash dividend became and was, and is, a trust fund, held by the Independence Lead Mines Company as a trust to be declared to the owners and holders of the stock on which such dividends had not been paid, and that there are many such stockholders who own such stock on which said dividends have not been paid.

### XIV.

For a long period of time the said Independence Lead Mines Company, and more particularly its President, F. C. Keane, for his own purposes and for the purpose of concealing the true condition of the affairs of said Company, neglected, failed and refused to file a report for the year 1943 and for the year 1944 and for the year 1945, as required by the rules and regulations of the Securities and Exchange Commission of the United States of America, and the rules and regulations of the Standard Stock Exchange of Spokane, Washington and the rules and regulations of the Spokane Stock Exchange of Spokane, Washington, and the Secretary of the Securities and Exchange Commission threatened to withdraw the said stock from its registration and from its trading on the Standard Stock Exchange and on the Spokane Stock

Exchange unless such reports were filed, so that, on or about the 20th day of March, 1947, such reports were filed with an audit made by L. J. Randall, a certified public accountant of the City of Wallace, Idaho, and which said reports were signed and filed by F. C. Keane as President of the Independence Lead Mines Company and by William Mullen, as Secretary of the said Company, as accurate and correct reports in regard to the condition of the affairs of the Independence Lead Mines Company. [68]

### XV.

The said audits and reports so made and filed as aforesaid disclosed that the said F. C. Keane, President of the Independence Lead Mines Company, had sold for his own use and benefit and for his own account, 218,000 shares of stock of the Clayton Silver Mines Co., being all the stock remaining in the possession of the Independence Lead Mining Company after the declaration of the said dividend and the withdrawal of the dividend by the various stockholders so withdrawing the same, and which constituted a trust fund as herein set out.

And the said reports further show that the said F. C. Keane had received for his own personal use and benefit the sum of \$152,257.00, no part of which was ever paid in to the treasury of the Independence Lead Mines Company, except the sum of \$34,750.00 paid by the said F. C. Keane in to the said Independence Lead Mines Company between January 1st and July 31st, 1946, leaving an

unpaid balance of \$117,597.00 due as of July 31, 1946.

The reports further show a bank balance of cash in banks of \$122.67 with heavy outstanding indebtedness.

## XVI.

The said plaintiff, W. E. Cullen, and his predecessors in interest, had equipped the said Independence Lead Mines, Ltd. throughout a tunnel length of approximately a mile and a quarter with heavy ties and rails and with mine machinery of various kinds of considerable value which remained in said tunnel and on the grounds of the said Independence Lead Mines until the said F. C. Keane became President thereof and the said Plaintiff avers, on his information and belief, that the said F. C. Keane, for his own uses and purposes, has removed all of said rails, ties and machinery and transferred the same to the Lucky Friday Mining Company, or some other nearby operating company, for what consideration said plaintiff does not know, and without any right or authority so to do. [69]

And the said plaintiffs further allege that the said mining tunnel and underground works have been allowed to cave in and the buildings have been allowed to fall into a bad state of repair and the entire mining property of the said Independence Lead Mines Company has been neglected for a long period of time and has been, and is, practically abandoned and has received no care or attention for a great period of time.



## XVII.

The said plaintiffs on their information and belief, allege the facts to be that the said F. C. Keane is the holder of record on the books of said corporation of a certificate of stock of 1,000 shares only and that, several years ago he sold and transferred the same, and the same is now owned by and in the possession of other parties than himself.

And the plaintiffs allege that, in any event, the said defendant, F. C. Keane, is the owner of a very small amount of stock of the Independence Lead Mines Company and has no interest in the said Company except to act as its President for a salary fixed by himself and for the purpose of securing the control and management and investment of the funds, mines and possession of said Independence Lead Mines Company; and that the said Independence Lead Mines Company is insolvent and unable to pay its bills and accounts and has been rendered insolvent by the acts and doings, for his own benefit, of the said F. C. Keane, acting as President of the said Company; when, in truth and in fact, he had no legal right of any kind to act as such Officer or Director or President.

Plaintiffs further allege that the Articles of Incorporation and By-Laws of the Independence Lead Mines Company provide for a Board of Directors of a minimum number of three directors to manage the affairs of said corporation and that ever since the first of January, 1942, said F. C. Keane had no directorship rights legally vested in him, except to call a stockholders' meeting to elect



a legal Board of Directors [70] on January 1st, 1942, and ever since said time the said defendant has constituted himself a Board of Directors of one member and every act and thing he has done since said time in the affairs of said corporation was, and is, void and fraudulent and not binding on said corporation, the Independence Lead Mines Company.

### XVIII.

The said plaintiffs attach hereto, as part of this complaint, a statement of account marked "Exhibit A", taken from the report to the Spokane Stock Exchange for the year 1942 showing the receipt by said Independence Lead Mines Company of dividends from the Clayton Silver Mines Co. during said year amounting to \$35,035.00 and expenses of the said Board of Directors, including salaries paid, of a total of \$7,730.00, with a balance charged to surplus of \$27,305.00.

Also receipt of dividends in the year 1943 from the said Clayton Silver Mines Co. of \$30,030.00, with expenses of said officers and salaries amounting to the sum of \$10,885.43, leaving a balance accruing to earned surplus in the sum of \$19,144.57.

For the year 1944 dividends received from the said Clayton Silver Mines Co. of \$17,560.00 and expenses of the said F. C. Keane, including salaries, of \$13,163.41, leaving a net profit accruing to surplus of \$4,396.59.

### XIX.

Plaintiffs allege that the Independence Lead Mines Company, as heretofore stated, is managed

and controlled entirely by F. C. Keane and state that, on their information and belief, a dividend of considerable amount is about to be paid to the Independence Lead Mines Company by the said Clayton Silver Mines Co. and will accrue to the benefit of the officers of the said Company and not to the benefit of the stockholders of the said Company; and the said plaintiffs allege that immediate and irreparable injury, loss and damage will result to the said [71] plaintiffs and the Independence Lead Mines Company unless a Receiver pendente lite is appointed herein before notice can be served on the defendants and a hearing on this application can be had.

## XX.

The plaintiffs further allege that they are entitled to their costs and expenses, including reasonable attorneys' fees in the bringing of this action.

Wherefore these plaintiffs pray:

1. That a summons be issued requiring each and all of said defendants to appear in Court to answer the complaint of the plaintiffs on file herein.

2. That a Receiver pendente lite be appointed herein immediately and without notice, with full power to take possession of all the property of said defendant, the Independence Lead Mines Company, including its books of account, stock books, records, bank accounts, personal property of any and all kinds, and all the real property and mines

of the said defendant, the Independence Lead Mines Company; and that, after hearing duly had, the appointment of said Receiver be made permanent.

3. That the defendants and each and all of them be restrained and enjoined from interfering with the possession of the Receiver of such property and be ordered and directed to turn over to said Receiver all of the property, personal and real, of every kind belonging to said Independence Lead Mines Company.

4. That said plaintiffs be allowed their costs and expenses in this behalf expended, including reasonable attorneys' fees.

5. That the said plaintiffs have such further and additional relief herein as may be just and equitable.

R. MAX ETTER,  
WILLIAM E. CULLEN,  
Attorneys for Plaintiffs. [72]

State of Washington,  
County of Spokane—ss.

W. E. Cullen, being duly sworn, deposes and says: That he is one of the foregoing plaintiffs; that he has read the foregoing complaint and knows the contents thereof and the same are true of his own knowledge, except as to those things stated

therein as being upon information and belief and as to those, he believes the same to be true.

W. E. CULLEN.

Subscribed and sworn to before me this 28 day of April, 1947.

(Seal) JAMES P. DILLARD, JR.

Notary Public in and for the State of Washington, residing at Spokane. [73]

### EXHIBIT "A"

Accounts shown by reports of the Independence Lead Mines Company on file with the Spokane Stock Exchange, Spokane, Washington.

#### YEAR 1942

Dividend of Clayton Silver Mines Co.....		\$35,035.00
Salaries.....	\$3,423.50	
Interest.....	258.78	
Filing and Registration.....	25.50	
Insurance.....	174.75	
Legal and Accounting.....	757.60	
Postage.....	30.06	
Supplies.....	72.81	
Taxes.....	1,991.57	
Telephone.....	61.53	
Travel.....	933.90	
Total Expenses .....		7,730.00
Balance to Surplus.....		\$27,305.00

#### YEAR 1943

Dividend of Clayton Silver Mines.....		\$30,030.00
Officers' Salaries.....	\$4,200.00	
Travel.....	2,157.62	
Accounting and Auditing.....	700.00	
Geology and Engineering.....	900.00	
Surface Repairs.....	430.13	
Office Supplies.....	162.83	

## Year 1943—(Continued)

Insurance.....	135.40	
Light and Power.....	158.90	
Telephone.....	60.65	
Interest.....	55.34	
Misc.....	322.30	
Income Tax.....	\$817.03	
Capital Stock.....	138.75	
State & County Tax.....	163.15	
Social Security-Emp. Tax.....	483.33	1,602.26
		<hr/>
Total expense .....		10,885.43
		<hr/>
To Earned Surplus.....		\$19,144.57

## EARNED SURPLUS

Bal. Jan. 1, 1943 (deficit).....	\$217,989.25
Prior surplus adj. ....	247.05
	<hr/>
	\$217,742.20
Bal. Dec. 31, 1943 (deficit).....	\$198,597.63

## YEAR 1944

Dividends of Clayton Silver Mines Co.....		\$17,560.00
Officers' Salaries.....	\$ 4,200.00	
Travel.....	771.72	
Accounting and Auditing.....	700.00	
Geology & Engineering.....	1,231.90	
Surface Repairs.....	22.00	
Office Supplies and Expense.....	209.40	
Insurance.....	12.00	
Light and Power.....	84.88	
Telephone.....	56.76	
Taxes.....	5,871.70	
	<hr/>	
Total Expense .....		13,163.41
		<hr/>
Net Profit .....		\$ 4,396.59

Sale price 80,000 shares of Clayton Silver	
Mines Co. ....	\$40,961.00
Book value of above.....	69,708.00
Loss on sale.....	28,747.00
<hr/>	
Net Loss .....	\$24,350.41

Earned Surplus bal. Dec. 31, 1943 (deficit)....	\$198,597.63
Earned Surplus bal. Dec. 31, 1944 (deficit)....	222,948.04

## YEAR 1945

Sales 138,000 shares Clayton Silver Mines Co. ....	\$ 71,760.18	
Book value of 138,000 shs. Clayton Silver Mines Co. ....	120,246.30	
	<hr/>	
Sales Loss .....		\$ 48,486.12
Officers' Salaries.....	\$ 3,700.00	
Travel.....	57.61	
Accounting and Auditing.....	25.00	
Legal.....	1,141.68	
Ceology.....	250.00	
Insurance.....	183.25	
Light and Power.....	134.93	
Telephone.....	60.15	
Interest.....	220.85	
Misc.....	371.07	
Income Tax.....	\$10,227.91	
State.....	1,697.35	
Soc. Security.....	197.77	
Rev. Stamps.....	249.18	
Property Tax.....	239.79	
Corp. License.....	58.00	12,680.00
	<hr/>	<hr/>
Total Expense .....		18,829.54
		<hr/>
Net Loss For Year.....		\$67,315.66

“Supplementing my examination of the Independence Lead Mines Company on Form 10-K for the years 1944 and 1945.

I inadvertently omitted a qualification pertaining to the following transactions relative to the disposal through sale of 218,000 shares of Clayton Silver Mines stock.

It should be pointed out the company had not recorded sales transactions of the 218,000 shares of the Clayton Silver Mines stock sold during the year 1944 and 1945. At the outset of the examination I was verbally informed by F. C. Keane, President of the Independence Lead Mines Company,



that the stock had been sold through his personal account and was given the names of J. T. Halin, Arthur Schelde, and Frank Lilly of Spokane, Washington, as the purchasers of the stock through private transactions. In order to confirm these sales I corresponded directly with the purchasers of the Clayton Silver Mines stock and addressed a letter to each purchaser.

I received direct communication from J. T. Halin and Arthur Schelde of Spokane, Washington, accounting for 185,000 shares of Clayton Silver Mines stock giving detail as to date and amount of each check paid to either F. C. Keane or the Montana Leasing Company at a total sales price of \$94,723.10 (51.2c per share), and from Frank Lilly of Spokane, Washington, for 40,000 shares at a total sales price of \$22,000 (55c per share). In addition, Mr. Keane informed me that 4,000 shares were sold on the name of O. Rairdon for approximately 51.2c per share of \$2,048.08 although no verification was secured on this transaction.

F. C. Keane reacquired 11,000 shares which were issued as dividends to common stock of the Independence Lead Mines.

Since the above transactions were never recorded on the records of the Independence Lead Mines Company and since it was impossible to reconcile the amounts received from sale of stock with deposits made on the bank statements, I thought it necessary in order to account for the disposition of the stock to make an entry, charging the Montana Leasing Co., based on information contained

in the confirmations, for the entire sales price with offsetting credit for the 11,000 shares reacquired at 55c per share, which according to the confirmation was the highest price at which the stock was sold. This resulted in a net charge of \$112,721.18 for 218,000 shares.

Proper accounting procedure would have required that all receipts from the sale of stock be deposited in the bank account of the Independence Lead Mines Co., and disbursements issued therefrom. The method in which these transactions were handled, therefore, would not conform to generally accepted accounting principles.

L. J. RANDALL, C. P. A.

Box 738, Scott Building

Wallace, Idaho

[Endorsed]: Filed April 28, 1947. [76]

---

[Title of Court and Cause]

SHOW CAUSE AND TEMPORARY  
RESTRAINING ORDER

To: Independence Lead Mines Company, an Arizona Corporation; F. C. Keane and Glynn D. Evans and William Mullen, Directors of said Corporation.

From the verified complaint herein, good and sufficient reasons appearing that plaintiffs will suffer immediate and irreparable injury, loss or damage, and it otherwise appearing necessary and proper, therefor,

It is hereby ordered that .....  
the defendants named and each of them shall ap-

pear before me at my courtroom in the Federal Post Office Building, Coeur d'Alene, Idaho, at the hour of 2 P. M. on the 2nd day of May 1947, then and there to show cause why a receiver should not be appointed to take possession of all the property of said defendant, the Independence Lead Mines Company, including its books of account, stock books, records, bank accounts, personal property of any and all kinds, and all the real property and mines of the said defendant, the Independence Lead Mines Company.

And the defendants and each of them are hereby restrained pending hearing on this order from disposing of any assets of the said defendant, the Independence Lead Mines Company, and from paying over personally or to the interest or the account of any of said defendants any funds, stock or other assets whatsoever of the said defendant, the Independence Lead Mines Company.

Dated this 28th day of April, 1947.

CHASE A. CLARK,

Judge of the District Court of the United States,  
for the District of Idaho, Northern Division.

[Endorsed]: Filed April 28, 1947. [77]

---

[Title of Court and Cause]

#### NOTICE OF APPEAL

Notice is hereby given that the Independence Lead Mines Company, a corporation, defendant in the above-entitled action, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit

from the final order entered in this action. Such order was entered, after and following argument in this action, on the 16th day of February, 1948, by order entitled "Order Dismissing Petition to Vacate and Set Aside Judgment".

/s/ R. MAX ETTER,  
/s/ WILLIAM E. CULLEN,  
!s! WALTER H. HANSON,  
Attorneys for Defendant.

[Endorsed]: Filed May 12, 1948. [78]

---

[Title of Court and Cause]

### COST BOND ON APPEAL

Know all men by these presents:

That the undersigned, Independence Lead Mines Company, an Arizona corporation, the defendant in the above-entitled action, as Principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, authorized to transact the business of surety in the State of Idaho, as Surety, are held and firmly bound unto the above-entitled Alma R. Kingsbury and Olga Marquardt in the full and just sum of Two Hundred Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principal and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of May, 1948.

Whereas, lately on the 16th day of February, 1948, at the fall term of the District Court of the

United States, in and for the District of Idaho, Northern Division, in a suit *depending* in said court between Alma R. Kingsbury and Olga Marquardt, plaintiffs, and Independence Lead Mines Company, defendant, a final order was rendered against the said Independence Lead Mines Company, and the said Independence Lead Mines Company has duly filed Notice of Appeal from said final order, entitled "Order Dismissing Petition to Vacate and Set Aside Judgment",

Now, therefore, the condition of the above obligation is such that if the said Independence Lead Mines Company shall prosecute said appeal to effect, and answer all costs, not exceeding Two Hundred Fifty Dollars, if it fails to make good [79] its plea, then the above obligation to be void, else to remain in full force and virtue.

(Seal)

INDEPENDENCE LEAD  
MINES COMPANY

By W. E. Cullen,  
President

By F. W. Kiesling,  
Secretary

(Seal)

UNITED STATES FIDELITY  
AND GUARANTY  
COMPANY

By J. T. Paradise,  
Attorney-in-fact

Countersigned at Sandpoint, Idaho.

FARMIN INSURANCE  
AGENCY

By Robt. Coons

(Attached)

## GENERAL POWER OF ATTORNEY

No. 57257

Know all Men by these Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint J. T. Paradise of the City of Spokane, State of Washington its true and lawful attorney for the following purposes, to-wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said J. T. Paradise may lawfully do in the premises by virtue of these presents. [80]

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-Presi-



dent and Assistant Secretary, this 15th day of September, A. D. 1941.

(Seal) UNITED STATES FIDELITY  
AND GUARANTY  
COMPANY.

By /s/ E. W. Levering, Jr.  
Vice-President.

/s/ J. E. Gittings  
Assistant Secretary.

State of Maryland,  
Baltimore City—ss:

On this 15th day of September, A. D. 1941, before me personally came E. W. Levering, Jr., Vice-President of the United States Fidelity and Guaranty Company and J. E. Gittings, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said E. W. Levering, Jr. and J. E. Gittings were respectively the Vice-President and the Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order

as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A.D. 1943.

(Seal)      /s/ FRIEDA WALTER,  
Notary Public.

State of Maryland,  
Baltimore City—ss.

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do [81] hereby certify that Frieda Walter, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 15th day of September, A. D. 1941.

(Seal)      /s/ M. LUTHER PITTMAN,  
Clerk of the Superior Court of Baltimore City.

#### COPY OF RESOLUTION

That Whereas, it is necessary for the effectual transaction of business that this Company appoint

agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, [82] or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required

or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Harry Prevost, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to J. T. Paradise of Spokane, Washington, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and [83] correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my

hand and the seal of the United States Fidelity and Guaranty Company, this 11th day of February, 1948.

HARRY PREVOST,  
Assistant Secretary.

[Endorsed]: Filed May 12, 1948. [84]

---

[Title of Court and Cause]

DESIGNATION OF RECORD AND PROCEED-  
INGS TO BE INCLUDED IN RECORD  
ON APPEAL

Comes now the Independence Lead Mines Company, a corporation, defendant in the above-entitled action, and hereby designates the complete record and proceedings in the above-entitled cause to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, Cause No. 1603-N, filed in this court June 23, 1945.

2. Answer of Independence Lead Mines Company, a corporation, defendant, filed in this court April 29, 1946, in the case of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, Cause No. 1603-N.

3. Amendment to Complaint, filed in this court



by plaintiffs on May 22, 1946, in Cause No. 1603-N.

4. Stipulation filed in this court June 29, 1946, in Cause No. 1603-N.

5. Judgment and Decree filed in this court June 29, 1946, in Cause No. 1603-N.

6. Motion of Defendant, Independence Lead Mines Company, to Vacate and Set Aside Judgment and Reopen Said Cause to Allow Independence Lead Mines Company to File a Proper Answer and to Reopen Said Cause for Trial, filed in this court June 23, 1947, in Cause No. 1603-N.

7. Notice of Association of Walter H. Hanson of Wallace, Idaho, as Associate Counsel, filed by defendant in this court August 25, 1947, in Cause No. 1603-N.

8. Motion of Plaintiffs, Alma Kingsbury and Olga Marquardt, to Dismiss Defendant's Petition for Order Setting Aside Judgment, filed in this court on or about September 12, 1947, in Cause No. 1603-N.

9. Motion of Plaintiffs, Alma Kingsbury and Olga Marquardt, to strike Portions of Defendant's Petition for Order Setting Aside Judgment, filed in this court on or about September 12, 1947, in Cause No. 1603-N. [85]

10. Defendant's Notice to plaintiffs to bring on Motion for Production of Documents, filed in this court on September 24, 1947, in Cause No. 1603-N.

11. Defendant's Motion for Production of Docu-



ments and Affidavit of W. E. Cullen in support of motion, designated as Exhibit "A" in said motion, and filed in this court on September 22, 1947, in Cause No. 1603-N.

12. Plaintiffs' Motion to Quash Notice of Motion, and Affidavit of H. J. Hull in support thereof, filed in this court in Cause No. 1603-N.

13. Certificate to Accompany Motion for Production of Documents, filed by Defendant in this court on September 27, 1947, in Cause No. 1603-N.

14. Affidavit of Mailing Notice and Motion, filed by the Defendant in this court on September 24, 1947, in Cause No. 1603-N.

15. Defendant's Amendment to Motion to Vacate and Set Aside Judgment and Reopen said Cause to Allow Independence Lead Mines Company to File a Proper Answer and to Reopen said Cause for Trial, filed in this court on or about December 15, 1947, in Cause No. 1603-N.

16. Stipulation of Plaintiffs and Defendant, filed in this court in Cause No. 1603-N.

17. Plaintiffs' Motion to Dismiss Defendant's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

18. Plaintiffs' Motion to Strike Portions of Defendant's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

19. Motion of Plaintiffs for More Definite

Statement, Directed to Defendant Corporation's Amended Petition for Order Setting Aside Judgment, dated December 15, 1947, and filed in this court in Cause No. 1603-N.

20. Affidavit of H. J. Hull, dated December 13, 1947, and filed in this court in Cause No. 1603-N.

21. Affidavit of Alma Kingsbury, dated December 13, 1947, and filed in this court in Cause No. 1603-N.

22. Order of the court, dated February 9, 1948, and filed in this court February 9, 1948, in Cause No. 1603-N.

23. Order Dismissing Petition to Vacate and Set Aside Judgment, dated February 16, 1948, and filed in this court in Cause No. 1603-N. [86]

24. Complaint, and Exhibits attached, in the case of L. J. Hopkins and W. E. Cullen, Plaintiffs, vs. Independence Lead Mines Company, an Arizona Corporation and F. C. Keane and Glynn D. Evans and William Mullen, Directors of said corporation, Defendants, Case No. 1687, filed in this court on April 28, 1947.

25. Show Cause and Temporary Restraining Order in Cause No. 1687, filed in this court, signed by the court and dated April 28, 1947.

26. Order of the court, Case No. 1687, filed in this court on November 17, 1947.

The Clerk of the above-entitled court is hereby directed to prepare, certify and transmit to said

Circuit Court of Appeals the above-designated record on appeal.

Dated this 11th day of May, 1948.

R. MAX ETTER  
WILLIAM E. CULLEN  
WALTER H. HANSON  
Attorneys for Defendant.

(Affidavit of Mailing attached.)

[Endorsed]: Filed May 12, 1948. [87]

---

[Title of Court and Cause]

#### APPELLEES' DESIGNATION OF RECORD

Alma R. Kingsbury and Olga Marquardt, appellees in the above entitled cause, designate the following for inclusion in the record on appeal:

Plaintiffs' Motion for Default, filed April 29, 1946.

Affidavit of H. J. Hull, supporting motion for default, filed April 29, 1946.

Defendant's Notice of Appeal, filed May 12, 1948.

Defendant's Designation of Record and Proceedings to be Included on Record on Appeal, dated May 11, 1948, and filed on or about May 12, 1948.

This Designation of the contents of the record on appeal.

H. J. HULL,  
J. K. CHEADLE.

(Service Acknowledged.)

[Endorsed]: Filed May 24, 1948. [88]

[Title of Court and Cause]

### STIPULATION RE RECORD ON APPEAL

Pursuant to Rule 75(h) of RCP, it appearing that by inadvertent error, or accident, certain items were omitted from previous designations of record on appeal in the above cause; and pursuant to Rule 75(f); and in order that the record be abbreviated in accordance with Rule 75(e).

It is stipulated between the parties to the above entitled cause that there be included in the record on appeal to be certified and transmitted by the clerk of the district court the following, and only the following items:

1. Complaint of Alma R. Kingsbury and Olga Marquardt, plaintiffs, vs. Independence Lead Mines Company, a corporation, defendant, filed June 23, 1945.

2. Motion to dismiss complaint, filed *July 25, 1945, 1945.*

3. Order denying motion to dismiss, entered and filed December 30, 1945.

4. Plaintiffs' motion for default, served April 27, 1946, and filed April 29, 1946.

5. Affidavit of H. J. Hull supporting motion for default, served April 27, 1946, and filed April 29, 1946.

6. Answer of Independence Lead Mines Company, a corporation, defendant, served and filed April 29, 1946.

7. Amendment to complaint, filed May 22, 1946.

8. Stipulation, filed June 29, 1946.

9. Judgment and decree, filed June 29, 1946.

10. Motion of defendant, Independence Lead Mines Company, to vacate and set aside judgment and reopen said cause to allow Independence Lead Mines Company to file a proper answer and to reopen said cause for trial, filed June 23, 1947.

11. Motion of plaintiffs, Alma Kingsbury and Olga Marquardt, to dismiss defendant's petition for order setting aside judgment, filed on or about September 12, 1947. [89]

12. Defendant's amendment to motion to vacate and set aside judgment and reopen said cause to allow Independence Lead Mines Company to file a proper answer and to reopen said cause for trial, served December 6, 1947 and filed on or about December 12, 1947.

13. Stipulation of plaintiffs and defendant, dated December 15, 1947 and filed on or about December 16, 1947.

14. Plaintiffs' motion to dismiss defendant's amended petition for order setting aside judgment, dated December 15, 1947, and filed on or about December 16, 1947.

15. Order of the court, dated February 9, 1948, and entered and filed in this court February 9, 1948.

16. Order dismissing petition to vacate and set aside judgment, dated February 16, 1948, entered and filed in this court on or about March 30, 1948.

17. Complaint, and exhibits attached, in the case

of L. J. Hopkins and W. E. Cullen, plaintiffs, vs. Independence Lead Mines Company, an Arizona corporation, and F. C. Keane and Glynn D. Evans and William Mullen, directors of said corporation, defendants, Case No. 1687, filed in this court on April 28, 1947.

18. Show cause and temporary restraining order in Cause No. 1687, filed in this court, signed by the court and dated April 28, 1947.

19. Defendant's notice of appeal, filed May 12, 1948.

20. Defendant's bond for costs on appeal, filed May 12, 1948.

21. Defendant's designation of record and proceedings to be included on record on appeal, dated May 11, 1948, and filed on or about May 12, 1948.

22. Plaintiffs' designation of the contents of the record on appeal, served May 21, 1948, and filed May 24, 1948.

23. This stipulation re record on appeal.

It is further stipulated between said parties that this stipulation as to the record and proceedings to be included in the record on appeal shall be followed by the clerk of the district court instead of the designations heretofore served and filed by the parties.

It is further stipulated between said parties that inclusion in this stipulation of the items above designated as Nos. [90] 17 and 18 shall be without prejudice in any way to a motion, by appellees, to strike said items from the record or to objection



by appellees to consideration of said items by the appellate court; and that this stipulation shall not constitute a waiver nor prejudice in any way any motion by appellees to dismiss the appeal for any reason.

Dated: June 4, 1948.

R. MAX ETTER,

By WEC

WILLIAM E. CULLEN,

.....

H. J. HULL,

J. K. CHEADLE,

Attorneys for Appellees, Alma R. Kingsbury and  
Olga Marquardt.

[Endorsed]: Filed June 11, 1948. [91]

---

[Title of Court and Cause]

### CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 91 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the

Ninth Circuit, in accord with designations of contents of record on appeal of the appellant and appellees, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten record amount to the sum of \$36.40, and that the same have been paid in full by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of June, 1948.

(Seal)

ED. M. BRYAN,  
Clerk.

---

[Endorsed]: No. 11959. United States Circuit Court of Appeals for the Ninth Circuit. Independence Lead Mines Company, a corporation, Appellant, vs. Alma R. Kingsbury and Olga Marquardt, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Filed June 21, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,  
Ninth Circuit

No. 11959

INDEPENDENCE LEAD MINES COMPANY,  
an Arizona corporation,

Appellant,

vs.

ALMA R. KINGSBURY and  
OLGA MARQUARDT,

Appellees.

REQUEST FOR PRINTING OF RECORD AND  
STATEMENT OF POINTS

I.

Appellant deems necessary on this appeal, to a proper understanding of the questions involved, the consideration by the Court of the entire record certified to this Court by the Clerk of the District Court in accordance with Stipulation re Record on Appeal entered into between appellant and appellees on June 4, 1948, and including this request for printing of record and statement of points, and hereby requests that the same be printed, excepting and omitting formal parts of pleadings and other court papers.

II.

Appellant hereby designates for consideration on this appeal the following points on which it intends to rely:

(1) The appellant's motion to vacate and set aside judgment and reopen said cause to allow

Independence Lead Mines Company to file a proper answer and to reopen said cause for trial may and should be treated by the Court as a proper petition or complaint in an action based upon the fraudulent participation by the appellees in procuring the judgment originally entered against the appellant and against which judgment the appellant now seeks relief. The formal designation of appellant's so-called motion is immaterial if in fact the allegations therein allege fraud in the procurement of the original judgment. [1]

(2) The allegations of the amended motion or petition sufficiently allege facts, which, if true, show such connivance and fraudulent participation on the part of the appellees in procuring the judgment which would justify setting aside that judgment heretofore obtained by them against the appellant, and the petition because of such factual showing is not vulnerable to a motion to dismiss.

(3) The amended motion or petition shows and sufficiently alleges that the appellees had full and complete knowledge prior to the entry of the judgment herein against the appellant and in favor of the appellees that none of the officers of the appellant were either legally constituted officers of the appellant or defacto officers and the appellees knew that the then so-called president of the appellant, who was also the attorney for the appellant, had appropriated stock belonging to the appellant to his own use, and they knew when they entered into the stipulated judgment with the appellant through its so-called president and attorney for all

of the remaining stock held by the appellant and sought by them that only that certain definite amount of stock taken by them in said judgment remained in the treasury of the appellant; and the appellees knew that such stock was imposed with a trust character for all of the stockholders of the appellant who were holders of common assessable stock in the appellant corporation, and they knew that no payment of said stock had ever been authorized to them or any other stockholders of the appellant who owned so-called Class "A" non-assessable stock.

(4) The appellees knew the exact condition of the appellant corporation and they knew of the defalcations and misappropriations of the so-called president and its attorney a long time prior to the entry of any stipulated judgment between them and the appellant, and the appellees knew and had first-hand knowledge of the misappropriations from the appellant by its so-called [2] president because they had been approached by an agent of the so-called president of the appellant, who informed them of said facts concerning the appellant corporation and who proposed to them prior to the entry of judgment the settlement that could be made.

(5) The appellees knew for a long time that none of the directors of the appellant corporation with whom they were dealing were legally constituted directors and they knew that said directors were not defacto directors and they knew that said direc-

tors held no stock in the appellant corporation and therefore could not act as directors and they knew that said directors of the appellant corporation could not bind and obligate the company.

(6) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts in such petition clearly alleged participation by the appellees in fraud in the procurement of the judgment against the appellant.

(7) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly shows that the so-called officers and directors of the appellant had no capacity to bind the appellant, which the appellees well knew, and because the appellees had means of knowledge and actual notice of all of the affairs of the appellant and were charged by such notice with dealing with the appellant's so-called president and officers at their peril.

(8) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the amended motion or petition clearly alleges such knowledge by the appellees of the appellant corporation's affairs that there was a duty on their part to refrain from acting or collaborating or participating with the appellant's so-called president or directors and because there had been [3] sufficient notice to them that said directors were not



legal directors or defacto directors or entitled in any way to act for the appellant corporation.

(9) The District Court erred in sustaining the motion to dismiss of the appellees directed against the appellant's amended motion or petition because the facts alleged in the petition conclusively show the existence of extrinsic fraud in the procurement of the judgment and in the participation of the procurement of said judgment by the appellees, and the amended motion or petition further clearly shows and alleges that the appellees did participate in the fraudulent procurement of the judgment and thereby participated in the fraud upon the appellant and upon the court.

/s/ R. MAX ETTER,

/s/ WILLIAM E. CULLEN,

/s/ WALTER H. HANSON,

By C.,

Attorneys for Appellant.

Service of the foregoing Request for Printing of Record and Statement of Points, by receipt of a copy thereof, is hereby accepted this 6th day of July, 1948.

/s/ H. J. HULL,

/s/ J. K. CHEADLE,

Attorneys for Appellees.

[Endorsed]: Filed July 8, 1948. [4]

